TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 236.

JOSEPH A. SAWYER AND NELLIE A. SAWYER, PLAINTIFFS IN ERROR,

vs.

DANIEL S. PIPER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED JANUARY 26, 1904.

(18,374.)

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1 STATE OF MINNESOTA, } ss:
County of Steele, }

District Court, Fifth Judicial District.

DANIEL S. PIPER, Plaintiff,
against
JOSEPH A. SAWYER, NELLIE A. SAWYER, and L. C. WOODMAN, Defendants.

For his complaint herein said plaintiff respectfully alleges:

That on the 19th day of February, A. D. 1895, and at all times prior thereto herein set out, the said defendants, Joseph A. Sawyer and Nellie A. Sawyer, who then were and still are in relation to each other husband and wife, were the owners in fee and in possession of the following-described lands in said county of Steele, and State of Minnesota, to wit: The south half of the southwest

2 quarter, and the northeast quarter of the southwest quarter and the west one-fourth of the southeast quarter of section twenty-one (21), northwest quarter and the undivided one-half of the west half of the northwest quarter of the southwest quarter of section twenty-eight (28), and the northeast quarter and the north half of the southwest quarter and the undivided half of the southwest quarter of the southwest quarter of section twenty-nine (29), and the north half of the northeast quarter, and the north half of the northwest quarter and the southwest quarter of the northwest quarter of section thirty-two (32) all in township one hundred and seven (107) north, range twenty (20) west containing in all seven hundred and ninety acres, more or less.

That on the 21st day of July, A. D. 1890, said defendant, Joseph A. Sawyer, and Nellie A. Sawyer his wife, being justly indebted to one Sarah L. Willis to the amount of five thousand dollars ($5,000), said Joseph A. Sawyer did execute and deliver to Sarah L. Willis his promissory note of that date, with interest coupons attached duly executed, whereby he promised to pay to the order of said Sarah L. Willis the principal sum of five thousand dollars ($5,000) five years after said date, with interest thereon payable semi-annually, on July 21st and January 21st of each year, at the rate of seven per cent. per annum, and interest upon each of said coupon interest notes to be paid also after due at seven per cent. per annum and to secure payment of said promissory note and interest coupon notes, said Joseph A. Sawyer and Nellie A. Sawyer, his wife, did at the same time duly execute and deliver their mortgage deed to said Sarah L. Willis of so much of said lands as are described as follows: The southwest

3 quarter of the southwest quarter, and the east one-half of the southwest quarter and the west half of the southwest quarter of the southeast quarter and the west half of the northwest quarter of the southeast quarter of section twenty-one (21) and the northwest quarter of section twenty-eight and the southeast quarter of the

northwest quarter and the undivided half of the southwest quarter of the southwest quarter of section twenty-nine (29), all in township one hundred and seven (107), range twenty (20). That in and by said mortgage it is stipulated that in case of foreclosure thereof an attorney's fee of seventy-five dollars ($75) shall be included and paid. That no part of said notes has been paid except only the interest thereon up to January 1st, 1894 save only as installment payments were made on the agreement hereinafter set out. That afterwards, pursuant to the agreement hereinafter set out, this plaintiff did, on the 3rd day of July, A. D. 1895, purchase the said notes and mortgage from said Sarah L. Willis, who did, by an assignment thereof in writing duly sell, assign and set over to this plaintiff the said notes and mortgages, and plaintiff is now the owner and holder thereof, and there is now due to plaintiff thereon the sum of five thousand five hundred and sixty and $\frac{6}{100}$ ($5,560.06) dollars and interest at seven per cent. from and after the 21st day of July, 1895, on five thousand five hundred forty-five and fifty one-hundredths ($5545.50) dollars save only as affected by the installment payments under the agreement hereinafter set out. That at the date of the agreement of February 19th, 1895, hereinafter set out, there was due on said notes and mortgage the sum of five thousand four
4 hundred and five and $\frac{90}{100}$ ($5405.90) dollars. That said mortgage was duly recorded in the office of the register of deeds of said Steele county on the 9th day of September A. D. 1890, at 9 o'clock a. m., in Book 0 of Mortgages, on page 174, and said assignment thereof was duly recorded in said register's office on the 6th day of September, A. D. 1895 at 1 o'clock p. m. in Book Y of Mortgages on page 427. That on the first day of April, A. D. 1892, the defendants, Joseph A. Sawyer and Nellie A. Sawyer, being justly indebted to one L. C. Woodman to the amount of eleven hundred dollars ($1,100), said Joseph A. Sawyer did execute and deliver to said L. C. Woodman his promissory note of that date, with interest at the rate of eight per cent. per annum, whereby he promised to pay to the order of L. C. Woodman, the principal sum of eleven hundred dollars on the first day of May, 1892, with interest thereon at the rate of eight per cent. per annum, and to secure the payment of said promissory note and interest said Joseph A. Sawyer did, at the same time, duly execute and deliver his mortgage deed to said L. C. Woodman of so much of the lands first herein described as are described as follows, to wit: The north half of the northwest quarter of section thirty-two (32) in range one hundred and seven (107) north of range twenty (20) west, which mortgage was given to secure a part of the purchase price of said premises, and that in and by said mortgage it was stipulated and agreed that in case of foreclosure thereof an attorney's fee of fifty dollars shall be included and paid. That no part of said note has been paid except only the interest thereon up to April 1st, A. D. 1893, save only as installment payments were made on the agreement hereinafter described and
5 set out. That thereafter this plaintiff did on the 31st day of January, 1895, purchase the said note and mortgage from said L. C. Woodman, and he did by an assignment thereof in writing

duly sell, assign and set over unto plaintiff the said note and mortgage and plaintiff is now owner and holder thereof, and there is now due the plaintiff thereon the sum of eleven hundred dollars and interest at the rate of eight per cent. per annum from and after April 1st, 1893, save only as affected by the installment payments under the agreement hereinafter set out. That on the day of the agreement of February 19th, 1895, hereinafter set out, there was due on said notes and mortgage the sum of twelve hundred sixty-five and $\frac{69}{100}$ ($1,265.69) dollars. That said mortgage was duly recorded in the office of the register of deeds of said Steele county, on the 7th day of November, 1892, at 3 o'clock p. m., in Book Z of Mortgages, on page 91, and said assignment thereof was duly recorded in said register's office on the 5th day of February, 1895, at 2 o'clock p. m., in Book Y of Mortgages, on page 394.

That on the 23rd day of January, A. D. 1894, said defendants, Joseph A. Sawyer and Nellie A. Sawyer, being justly indebted to this plaintiff, Daniel S. Piper, to the amount of twelve thousand dollars, said Joseph A. Sawyer did execute and deliver to this plaintiff his promissory note on that date, whereby he promised to pay to this plaintiff or order the principal sum of twelve thousand ($12,000) dollars one year after date with interest thereon at the rate of six per cent. per annum, and to secure the payment of said promissory note and interest said Joseph A. Sawyer and Nellie A. Sawyer, his wife, did at the same time duly execute and deliver their
6 mortgage deed to plaintiff of so much of the lands first above described as are described as follows, to wit: The south half of the southwest quarter, the northeast quarter of the southwest quarter and west half of west half of the southeast quarter of section twenty-one (21) and the northwest quarter of section twenty-eight (28) and the northeast quarter and the north half of the southwest quarter and the undivided half of the southwest quarter of the southwest quarter of section twenty-nine (29), and the north half of the northeast quarter and the north half of the northwest quarter and southwest quarter of northwest quarter of section thirty-two (32) all in township one hundred and seven (107), north of range twenty (20) west, containing in all eight hundred acres, more or less. That in and by said mortgage it is stipulated that in case of foreclosure thereof an attorney's fee of one hundred dollars shall be included and paid. That no part of said note or interest has been paid save only as installment payments were made on the agreement hereinafter set out. And plaintiff is now the owner and holder thereof and there is now due the plaintiff thereon the sum of twelve thousand ($12,000) dollars and interest at six per cent. per annum from and after the 23rd day of January, 1894, save only as affected by the installment payment hereinafter set out. That at the date of the agreement of February 19th, 1895, hereinafter set out, there was due on said note and mortgage the sum of twelve thousand seven hundred and eighty dollars ($12,780). That said mortgage was duly recorded in the office of the register of deeds of said county, on the 30th day of July, 1894, at 8 o'clock a. m. in Book Z of Mortgages page 487.

That on the 1st day of November, 1893, the defendants,
7 Joseph A. Sawyer and Nellie A. Sawyer, his wife, being justly indebted to one August Deats to the amount of three thousand dollars ($3,000), said Joseph A. Sawyer did execute and deliver to said August Deats his promissory note of that date with interest thereon at the rate of six per cent. per annum, whereby he promised to pay to the order of August Deats the principal sum of three thousand dollars ($3,000) one year after said date with interest thereon at the rate of six per cent. per annum and to secure the payment of said promissory note and interest, said Joseph A. Sawyer and Nellie A. Sawyer did at the same time duly execute and deliver their mortgage deed to said August Deats of so much of the lands first hereinbefore described, as is described as follows, to wit: The north half of the northeast quarter, the southwest quarter of the northeast quarter and the north half of the southwest quarter of section twenty-nine (29) township one hundred and seven (107) north of range twenty (20) west, containing in all two hundred acres of land more or less. That in and by said mortgage it is stipulated that in case of foreclosure thereof an attorney's fee of fifty dollars shall be included and paid. That no part of said note has been paid except the interest to November 1st, 1894, save only as installment payments were made on the agreement hereinafter set out. That on the 10th day of November, 1894 this plaintiff did purchase said note and mortgage from said August Deats, who did by an assignment thereof in writing duly sell, assign and set over unto this plaintiff the said note and mortgage, and plaintiff is now the owner and holder thereof. That there is now due the plaintiff thereon the sum of three thousand dollars ($3,000) with interest thereon at the rate of six per cent. per annum since the first
8 day of November, A. D. 1894 save only as affected by the installment payments under the agreement hereinafter set out. That at the date of the agreement of February 19th, 1895, hereinafter set out there was due on said note and mortgage the sum of three thousand and fifty-four dollars ($3,054). That said mortgage was duly recorded in the office of the register of deeds of the county of Steele, Minnesota, on the 20th day of January, A. D. 1894, at 4 o'clock p. m., in Book Z of Mortgages, on page 353, and said assignment thereof was duly recorded in said register's office on the 10th day of November, A. D. 1894, at 2 o'clock p. m., in Book Y of Mortgages on page 387.

That the mortgages hereinbefore set out and owned by plaintiff constitute all the mortgages on the premises first hereinbefore described on the date of said agreement, to wit, on the 19th day of February, A. D. 1895, or at any time since, and that plaintiff is the owner and holder of each of the same and that each of said mortgages remains wholly unsatisfied of record, and they are the mortgages referred to in said agreement which is hereinafter set out.

That on the 19th day of February, A. D. 1895, said Joseph A. Sawyer and Nellie A. Sawyer were justly indebted to this plaintiff in the full amount of twenty thousand and four hundred dollars ($20,400) as recited in the agreement hereinafter set out, and to a

much larger amount, for and on account of the several notes and mortgages hereinbefore set out as will appear therefrom, but then estimated at twenty thousand and four hundred ($20,400) dollars, and did in consideration thereof duly execute and deliver to plaintiff a deed of warranty of all said lands conveying the same to plaintiff. That at the same time and as parts of the same
9 transaction the said Joseph A. Sawyer and Nellie A. Sawyer of the one part, this plaintiff of the second part, and the said defendant L. C. Woodman, as a depositary of the deed in escrow hereinafter recited of the third part did make and enter into an agreement in writing, in the words and figures following, to wit: "This agreement made on the 19th day of February, A. D. 1895, by and between Joseph A. Sawyer and Nellie A. Sawyer, his wife, of the town of Owatonna, Steele county, Minnesota, parties of the first part, and D. S. Piper, of the town of Medford in said Steele county, party of the second part, and L. C. Woodman, of the city of Owatonna in said Steele county, witnesseth, That in consideration of certain indebtedness held by said party of the second part against said party of the first part, secured by mortgages upon the lands hereinafter described and in consideration that the said second party has taken and does herewith pay and take assignments to himself of all other mortgages upon said lands or any part thereof and in consideration of the agreement herein contained on the part of said second party to be kept and performed, said party of the first part shall, and do by indenture delivered herewith, convey to said party of the second part all those tracts and parcels of land situate in said town of Owatonna, in said Steele county, to wit: The south half of the southwest quarter and the northeast quarter of the southwest quarter and the west fourth of the southeast quarter of section twenty-one (21) and the northwest quarter and the undivided half of the west half of the northwest quarter of the southwest quarter of section twenty-eight (28) and the northeast quarter and the north half of the southwest quarter and the undivided half of the southwest quarter of the southwest quarter of section twenty-nine (29) and the north
10 half of the northeast quarter and the north half of the northwest quarter and the southwest quarter of the northwest quarter of section thirty-two (32), all in township one hundred and seven (107) north of range twenty (20) west, containing seven hundred and ninety (790) acres of land more or less. In further consideration of the premises said parties of the first part hereby agree to and with said second party that they will pay to him the full sum of one hundred dollars per month payable on or before the last day of February, A. D. 1895 and on or before the last day of each and every month thereafter continuously. Said Sawyer to pay the taxes on said lands for 1894 and to work out the highway taxes thereon thereafter, said party of the second part to pay all other taxes thereon and to keep the buildings insured in his favor for such sum as may be agreed upon from time to time and in default of any agreement in such sums as he may elect. Said party of the second part executes and delivers in escrow to said party of the third part as depositary a deed of warranty of all said lands run-

ning to said parties of the first part or either of them, as grantee, said deed to be held in escrow by said L. C. Woodman until said party of the first part shall have paid to said party of the second part all said monthly payments above stated, and also the sum of twenty thousand and four hundred dollars ($20,400) said payment of said principal sum to be made at such time or times as may be determined by said parties of the first part they having privilege of paying any sum of not less than fifty dollars at any time thereon. It being agreed and understood that said parties of the first part shall become entitled to the delivery to them or their assigns of said deed held by said third party in escrow as above at any time whatever pro-
11 vided only that they continuously pay said $100 monthly and also pay said sum of $20,400 in time and manner as above, and it is further provided that said monthly payments shall be diminished from and after any payment upon said $20,400 in the same proportion which the sum or sums paid thereon bear to said total sum of $20,400. Provided further, that upon failure by said party of the first part to pay said monthly payments, all their rights hereunder shall cease and determine. It is further understood that the several agreements and covenants herein shall extend to and be binding upon the several executors, administrators, heirs and assigns of the several parties hereto. Also that any sum or sums received under such policies of insurance by said second party shall, in case of the payment of the remainder of said $20,400 by said first parties, be held to be a part payment thereon to the amount of the net sum or sums so received. This agreement executed and delivered in triplicate. Interlineations and additions written in red ink were so written before execution thereof.

JOSEPH A. SAWYER.
NELLIE A. SAWYER.
DANIEL S. PIPER.

I accept the within-described deed upon the terms described above.

L. C. WOODMAN.

Dated February 19th, 1895.

That on said same day and as a part of the same transaction plaintiff did make, execute a deed of all said lands to said Nellie A. Sawyer, as provided in said agreement, and deliver the same in escrow to said defendant, L. C. Woodman, who still holds the same as depositary; that said plaintiff has in all respects fulfilled and complied with said agreement on his part, and has purchased and taken
12 an assignment to himself of said other notes and mortgages hereinbefore set out, pursuant to said agreement and now owns and holds the same. That said parties of the first part have made default in the conditions of said agreement and have wholly failed and refused, and do still fail and refuse to perform its conditions on their part to be performed, in that they have failed and refused, and do fail and refuse, to pay the installments of one hundred dollars which became due and payable under said agreement on the

ast day of January, A. D. 1896, and also each and every installment that became so due and payable thereunder on the last day of each and every month thereafter up till the present time, and every part thereof but that they did pay to plaintiff in monthly installments under said contract, up to the last day of December, A. D. 1895 sums amounting in all to eleven hundred dollars and no more.

That said lands constitute a valuable and improved farm, but that the entire value thereof is less than the whole amount so still due and unpaid to plaintiff under said transaction according to the terms of said agreement and that the same is in possession and occupancy of said Joseph A. Sawyer and Nellie A. Sawyer. That both said Joseph A. Sawyer and Nellie A. Sawyer are wholly insolvent. That before the commencement of this action this plaintiff did declare to said Joseph A. Sawyer and Nellie A. Sawyer the forfeiture by them of all their rights under said agreement and that they had ceased as provided thereby by reason of their said failure to pay said monthly payments, and did demand of them possession of said lands, and did also demand of said L. C. Woodman the delivery up of said
13 deed of escrow to plaintiff, all of which has been and is refused. That the whole amount actually due to plaintiff on all said matters, is the sum of twenty-three thousand and eight hundred and thirty and $\frac{40}{100}$ dollars, ($23,830.40) and interest upon twenty-one thousand six hundred and forty-five and fifty one-hundredths dollars ($21645.50) from and after this 21st day of April, A. D. 1897.

Wherefore plaintiff prays for judgment herein to the effect that by reason of said default on the part of said Joseph A. Sawyer and Nellie A. Sawyer to perform said agreement on their part, the whole of the sums so due upon said several mortgages and notes, and referred to in said agreement are now due and payable, and for judgment determining the amount due thereon, including said stipulated attorneys' fees and costs of suit, and for judgment of strict foreclosure of said contract and all said mortgages, forever barring said parties of the first part and all persons claiming or to claim by, through or under them of all right, title and interest in all said lands, unless redeemed by the payment of the amount so adjudged to be due thereon with interest within one year after such judgment, and that said deed of escrow be cancelled. Or in case the court shall deem it inequitable to so adjudge a strict foreclosure thereof as above prayed for, then that said contract and all said mortgages be by and under the judgment of this court foreclosed by sale of said mortgaged premises to satisfy the amount so adjudged to be due thereon together with costs of suit, stipulated attorneys' fees and costs of sale, subject to redemption as provided by law; and for judgment for said stipulated attorneys' fees so provided for in said sev-
14 eral mortgages and for costs and disbursements, and for such other further relief as to the court may seem just and equitable.

Dated at Owatonna, Minn., April 21st, 1897.

WHEELOCK & SPERRY,

Plaintiff's Attorneys, Owatonna, Minn.

Complaint duly verified by plaintiff on April 27th, 1897.

Answer; Venue; Title.

For their separate answer herein the above-named defendants, Joseph A. Sawyer and Nellie A. Sawyer:—

I.

Admit that on the 19th day of February, A. D. 1895, the plaintiff was the owner and holder of the two mortgages with the notes thereby secured, described in folios 14 to 19 of the complaint and that on said 19th day of February the parties hereto made, executed and delivered the agreement set forth in folios 24 to 33 of the complaint and that the respective deeds provided for in said agreement were made and delivered on the same day and as parts of the same general agreement. The terms and conditions of said agreement were arranged and agreed upon some days prior to the making and execution of said written agreement, which was in precise accord with, and included all the terms and conditions of said prior understanding and contract therefor. They admit that thereafter these defendants paid to plaintiff the several monthly payments under the terms of said agreement for the months of February to December inclusive, A. D. 1895. They allege that in and by said agreement the total sum, principal and interest due from these defendants or either of them, to the plaintiff, upon the payment by plaintiff
15 of all incumbrances upon any part of the premises described in said agreement, and including those then held by him was, by the mutual agreement of all parties to this action, fixed and set at the amount of twenty thousand and four hundred dollars, as stated therein, which said sum included interest upon all said sums to the said 19th day of February, 1895. These defendants admit that thereafter and in pursuance of said agreement this plaintiff paid all incumbrances upon any and all of said lands not then held by him, and took assignments of all thereof.

II.

Further, answering these defendants allege that the actual value of the said lands is much greater than the total sum, including interest, due or unpaid upon said agreement. They admit that they are the owners and in possession of all said lands, which constitute an improved farm.

III.

Further, answering these defendants aver that on or about the third day of August, A. D. 1896, this plaintiff commenced an action in this court against these defendants wherein as his cause of action this plaintiff averred that under and by virtue of the deed of said premises to him set forth in the complaint herein, he was, and ever since the date thereof had been, the owner of all said premises, and in which said former action plaintiff also set forth in full the said agreement, alleged default in the conditions thereof by these answering defendants, a declaration of forfeiture thereof by plaintiff, and

a demand theretofore made by plaintiff for the immediate possession of all said premises, in which said action this plaintiff prayed for such relief therein as he considered himself entitled to, which
16 said action now remains pending in this court. Defendants plead the pending of such action in abatement herein.

Save as hereinbefore admitted these defendants deny each and every allegation in the complaint herein contained.

Wherefore they ask that this action be dismissed.

Dated at Owatonna, Minnesota, May 17th, 1897.

J. A. SAWYER,
Attorney for Answering Defendants.

Duly verified, May 17th, 1897.

Reply.

Venue and title as above.

The plaintiff for reply to defendants' answer in the above-entitled matter.

I.

Denies each and every allegation of new matter in said answer set out.

II.

Further replying to defendants' answer plaintiff admits that heretofore and in August, 1896, plaintiff commenced an action against the defendants in which he set forth in the complaint therein that he was the owner of said premises and in which he set forth the agreement in the complaint therein, alleged default in the conditions thereof and a declaration of forfeiture by plaintiff of the possession thereof of all of said premises but denies that said action now remains pending in this court or otherwise. Further replying plaintiff alleges and charges the facts to be that subsequently to the commencement of said action and upon notice duly given and after argument thereof by the defendant, Joseph A. Sawyer, as counsel for defendants therein, and Wheelock & Sperry as counsel
17 for plaintiff therein, an order was made by the judge of the district court in said action dismissing the said action without prejudice to the plaintiff herein, which said order was dated and filed in the office of the clerk of this court on the 20th day of February, 1897. That subsequently thereto and in April 20th, 1897, judgment was duly made and entered therein by the clerk of the district court of Steele county, Minnesota, dismissing said action.

Wherefore plaintiff asks judgment as in his complaint prayed.

WHEELOCK & SPERRY,
Plaintiff's Att'ys.

Reply duly verified by the plaintiff in person.

Transcript of Evidence; Venue; Title.

The above-entitled action came on for trial before said court, Hon. Thomas S. Buckham, district judge, presiding, at the court-house in the city of Owatonna, said county and State, on the 2d day of June, A. D. 1897, Messrs. Wheelock & Sperry, and Robert Taylor appearing in behalf of the plaintiff, and J. A. Sawyer appearing in behalf of himself and Nellie A. Sawyer, and no appearance being made in behalf of the defendant, L. C. Woodman; at which time the following proceedings were had:

Mr. SAWYER: We offer to allow the plaintiff to take a decree of foreclosure in this case based upon and for the amount provided in the contract—or agreement. (Plaintiff's Ex. "E.") Which offer was declined by counsel for plaintiff.

Counsel for defendants, Joseph and Nellie A. Sawyer, admits that they were the owners of all these premises (premises involved
18 in this action) at the various times that these mortgages were given; admits that defaults have been made in the payment of the amounts due under said contract, Ex. "E;" admits that demand has been made on him for such sums which have become due under said contract Ex. "E," and admits that the only payments made are those which are alleged in the answer to have been made.

Mr. SPERRY: We offer in evidence the mortgage from Mr. and Mrs. Sawyer to Sarah L. Willis.

Mr. SAWYER: We object to that; by the pleadings the mortgage set up is merged in the agreement.

Mr. SPERRY: We also offer in connection with that the note given at the same time, as a part of the same transaction, with the coupons of the note.

Mr. SAWYER: We make the same objection.

Mr. SPERRY: We also offer the assignment of mortgage from Sarah L. Willis to D. S. Piper.

Mr. SAWYER: Same objection.

The above exhibits were marked Pl't'f's Ex. "A 1," "A 2" and "A 3."

Mr. SPERRY: We offer in connection with this the record of these instruments; first, of the mortgage found in Book 0.

Mr. SAWYER: The only objection is, not that the mortgages are not genuine, but that they are irrelevant and immaterial, because merged, under the pleadings, into the contract.

Mr. SPERRY: Continuing, the recording the Willis mortgage and notes found in Book 0 of Mortgages on page 174 is offered in evidence; and the record of the assignment in Book Y, page 427.

Also offer in evidence the mortgage and note from Joseph A.
19 Sawyer and wife to L. C. Woodman, described in the complaint, also the assignment from L. C. Woodman to D. S. Piper, (same marked Pl't'f's Ex. "B 1," "B 2" and "B 3;") also the record of the assignment of the mortgage found in Book Z of Mortgages found on page 91, and also the record of the assignment of the

mortgage, in Book Y of Mortgages, on page 394. Also the note and mortgage of Joseph A. Sawyer and Nellie A. Sawyer for twelve thousand dollars to Daniel S. Piper, (marked Pl't'f's Ex. "C 1" and "C 2.") Also the record of the mortgage found in Book Z of Mortgages, on page 467. Also the mortgage and note of Joseph A. Sawyer to August Deats for the sum of three thousand dollars, (the same marked Pl't'f's Ex. "D 1" and "D 2.") Also the record of the mortgage from Sawyer to Deats in Book Z, page 353. Also the assignment of this mortgage from August Deats to Daniel S. Piper, (Pl't'f's Ex. D 3.) And the record of the assignment in Book Y of Mortgages on page 387. We also offer in evidence the original agreement between Mr. Sawyer and Mrs. Sawyer, Mr. Piper and Mr. Woodman, bearing date the 19th day of February; 1895, (the same being Pl't'f's Ex. "E.")

Mr. SAWYER: We have no objection to the last offer Plaintiff's Ex. "E." It is admitted that the notes, mortgages and assignments, Exhibits "A 1," "A 2," "A 3," "B 1," "B 2," "B 3," "C 1," "C 2," "D 1," "D 2," "D 3," are the notes, mortgages and assignments described in plaintiff's complaint and referred to in the agreement, Ex. "E;" but we object to their admission here as irrelevant and immaterial, on the specific ground that each and all thereof were merged in the agreement, Ex. "E."

Objection is overruled by the court, and exception duly
20 taken by defendants' counsel. The exception being so taken to the admission of each of said exhibits separately.

Mr. SPERRY: We also offer in evidence the deed from Joseph A. Sawyer to Daniel S. Piper to the premises described in the complaint. (Pl't'f's Ex. "F.")

Mr. SAWYER: No objection.

Mr. SPERRY: And also the record of said deed found in Book 43 of Deeds, page 70.

Mr. L. C. WOODMAN, called as a witness in behalf of plaintiff, duly sworn, testified as follows: I am the L. C. Woodman referred to in Ex. "E," and have the deed herein described as delivered to me in escrow. Produces that deed.

Deed offered in evidence by Mr. Sperry.

Objected to by Mr. Sawyer as irrelevant and immaterial; this deed admitted and marked Pl't'f's Ex. "G."

Objection overruled to which defendants reserve an exception.

Mr. SAWYER: It is admitted that this is the deed referred to in the contract Ex. "E," subject to said objection.

The defendant, Mr. Sawyer, admits that prior to the commencement of this action the plaintiff, Piper, demanded of him the balance due on the contract set out in the complaint, or the immediate possession of the premises therein described, according to the terms of the agreement, Ex. "E," and declared to him that his rights had ceased unless he immediately paid the amount that was due.

Admitted that Mr. Piper declared the contract was forfeited unless payment was immediately made.

21 *Warranty Deed.*

This indenture, made this 19th day of February in the year of our Lord one thousand eight hundred and ninety-five, be-
22 tween Joseph A. Sawyer and Nellie A. Sawyer, his wife, of the county of Steele, and State of Minnesota, parties of the first part, and Daniel S. Piper, of the county of Steele, and State of Minnesota, party of the second part,

Witnesseth, that the said parties of the first part, in consideration of the sum of twenty-two thousand four hundred and six dollars to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey unto the said party of the second part his heirs and assigns forever all those tracts, or parcels of land lying and being in the county of Steele and State of Minnesota, described as follows, to wit: The south half (S. ½) of southwest quarter (S. W. ¼) and the northeast quarter (N. E. ¼) of southwest quarter (S. W. ¼) and the west one-fourth (W. ¼) of the southeast quarter (S. E. ¼) of section twenty-one (21) and the northwest quarter (N. W. ¼) and the undivided one-half (und. ½) of the west half (W. ½) of the northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) of section twenty-eight (28) and the northeast quarter (N. E. ¼) and the north half (N. ½) of the southwest quarter (S. W. ¼) and the undivided half of the southwest quarter (S. W. ¼) of the southwest quarter (S. W. ¼) of section twenty-nine (29) and the north half (N. ½) of the northeast quarter (N. E. ¼) and the north half (N. ½) of the northwest quarter (N. W. ¼) and the southwest quarter (S. W. ¼) of the northwest quarter (N. W. ¼) of section thirty-two (32), all in township one hundred and seven (107) north range twenty (20) west and containing seven hundred and ninety (790) acres more or less.

To have and to hold the same, together with all the here-
23 ditaments and appurtenances thereunto belonging or in anywise appertaining to the said party of the second part, his heirs and assigns forever. And the said Joseph A. Sawyer and Nellie A. Sawyer, his wife, parties of the first part for themselves and their heirs, executors, administrators do covenant with the said party of the second part his heirs and assigns, that they are well seized in fee of the lands and premises aforesaid, and have good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances except those now of record thereon and the above bargained and granted lands, and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said parties of the first part will warrant and defend.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JOSEPH A. SAWYER. [SEAL.]
NELLIE A. SAWYER. [SEAL.]

Signed, sealed and delivered in presence of
W. F. SAWYER.
A. L. SPERRY.

STATE OF MINNESOTA, } ss:
County of Steele, }

On this 19th day of February, A. D. 1895, before me, a notary public within and for said county, personally appeared Joseph A. Sawyer and Nellie A. Sawyer, his wife, to me well known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] W. F. SAWYER,
Notary Public, Minn.

24 *Warranty Deed.*

This indenture, made this 19th day of February in the year of our Lord one thousand eight hundred and ninety-five, between Daniel S. Piper and Lavania M. Piper, his wife of the county of Steele, and State of Minnesota, parties of the first part, and Nellie A. Sawyer, of the county of Steele, and State of Minnesota, party of the second part,

Witnesseth, that the said parties of the first part, for and in consideration of the sum of twenty thousand four hundred dollars, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do, by these presents, grant, bargain, sell, remise, release and convey unto the said party of the second part, and to her heirs and assigns forever, all the following-described lot, piece or parcel of land, situate in the county of Steele, and State of Minnesota, and known and described as follows, to wit: The south half (S. ½) of the southwest — (S. W. ¼) and the northeast quarter (N. E. ¼) of the southwest quarter (S. W. ¼) and the west quarter (W. ¼) of the southeast quarter (S. E. ¼) of section twenty-one (21) and the northwest quarter (N. W. ¼) and the undivided half (und. ½) of the west half (W. ½) of northwest quarter (N. W. ¼) of southwest quarter (S. W. ¼) of section twenty-eight (28) and the northeast quarter (N. E. ¼) and the north half (N. ½) of southwest quarter (S. W. ¼) and the undivided half (und. ½) of the southwest quarter of southwest quarter (S. W. ¼ of S. W. ¼) of section twenty-nine (29) and the north half (N. ½) of northeast quarter (N. E. ¼) and the north half (N. ½) of the northwest quarter (N. W. ¼) and the southwest quarter (S. W. ¼) of the northwest quarter (N. W. ¼) of section thirty-two (32),
all in township one hundred and seven (107) north range
25 twenty (20) west containing seven hundred ninety (790) acres more or less.

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, her heirs and assigns, forever. And the said Daniel S. Piper and Lavania M. Piper, parties of the first part, for themselves and their heirs, executors and administrators, do covenant with the said party of the second part, her heirs and assigns, that they have not made, done, executed or suffered any act or thing whatsoever, whereby the above-described premises or any part thereof now or at any time hereafter shall or

may be imperiled, charged or incumbered in any manner whatsoever; and the title to the above-granted premises against all persons lawfully claiming the same from, through or under them the said parties of the first part will forever warrant and defend.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

DANIEL S. PIPER. [SEAL.]
LAVANIA M. PIPER. [SEAL.]

Signed, sealed and delivered in presence of—

EMELINE L. WHITNEY.
MYRA A. PIPER.

STATE OF MINNESOTA, } ss:
County of Steele, }

On this 19th day of February, A. D. 1895, before me, a notary public, within and for said county, personally appeared Daniel S. Piper and Lavania M. Piper, his wife to me known to be the
26 persons described in, and who executed the foregoing and within instrument, and acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] S. M. FREEMAN,
Notary Public.

STATE OF MINNESOTA, } ss:
County of Steele, }

District Court, Fifth Judicial District.

DANIEL S. PIPER, Plaintiff,
against
JOSEPH A. SAWYER, NELLIE A. SAWYER, and L. C. WOODMAN, Defendants.

This action being at issue and in the calendar of the June, A. D. 1897 term of this court, was, on the second day of said month, being still of said term, tried by the court, Wheelock & Sperry and Robert Taylor, Esq., appearing for plaintiff and Joseph A. Sawyer, Esq., appearing for the defendants, Joseph A. Sawyer and Nellie A. Sawyer; due proof of the service of the summons and complaint having been made on the defendant L. C. Woodman, and the usual affidavit of default having been made and filed, and no appearance by said Woodman.

I find the following as the facts duly admitted or proven on such trial:

First. That on the 19th day of February, A. D. 1895, and at all times prior thereto herein set out, the said defendants, Joseph A. Sawyer and Nellie A. Sawyer, who were then and still are in relation to each other, husband and wife, were the owners in fee and in possession of the following-described lands in said county of Steele,

and State of Minnesota, to wit: The south half of the south-
27 west quarter and the northeast quarter of the southwest quarter, and the west one-fourth of the southeast quarter of section twenty-one (21) northwest quarter and the undivided half of the west half of the northwest quarter of the southwest quarter of section twenty-eight (28), and the northeast quarter and the north half of the southwest quarter and the undivided half of the southwest quarter of the southwest quarter of section twenty-nine (29) and the north half of the northeast quarter and the north half of the northwest quarter and the southwest quarter of the northwest quarter of section thirty-two (32), all in township one hundred and seven (107) north, range twenty (20) west, containing in all seven hundred and ninety acres (790), more or less.

Second. That on July 21st, 1890 the defendants, Sawyer and wife, executed and delivered to Sarah L. Willis, the note and mortgage of five thousand dollars in that behalf set out in the complaint, covering and conveying the following-described lands: The southwest quarter of the southwest quarter, and the east half of the southwest quarter and the west half of the southwest quarter of the southeast quarter and the west half of the northwest quarter of the southeast quarter of section twenty-one (21), and the northwest quarter of section twenty-eight (28) and the southeast quarter of the northeast quarter, and the undivided half of the southwest quarter of the southwest quarter of section twenty-nine (29), all in township one hundred and seven, (107) range twenty (20) in said county. Which mortgage was recorded in the register of deeds office in said county, on the 9th day of September, 1890, at 9 o'clock a. m., in Book 0 of Mortgages,
on page 174. That said mortgage contained a stipulation for
28 the payment of seventy-five dollars as an attorney's fees in case of foreclosure thereof.

Third. That on the first day of August, 1892, said defendants, Sawyer and wife, did execute and deliver to L. C. Woodman the note and mortgage of eleven hundred dollars in that behalf set out in the complaint, covering the following-described lands, to wit: The north half of the northeast quarter of section thirty-two (32) township one hundred and seven (107) north of range twenty west in said county and State, which mortgage was recorded in the register's office on the 7th day of November, 1892, at 2 o'clock p. m., in Book Z of Mortgages, on page 91, which said mortgage contained a stipulation for the payment of fifty dollars as an attorney's fee in case of foreclosure, thereof. That on January 31st, 1895 said note and mortgage were duly assigned to the plaintiff herein, which assignment was duly recorded in said register's office on February 5th, 1895, at 2 o'clock p. m., in Book Y of Mortgages, on page 394.

Fourth. That on November 1st, 1893, said defendants, Sawyer and wife, executed and delivered to August Deats the notes and mortgages for three thousand dollars in that behalf, set out in the complaint covering and conveying the following-described lands, to wit: The north half of the northeast quarter, and the southwest quarter of the northeast quarter and the north half of the southwest quarter of section twenty-nine (29) township one hundred and seven (107) north, range

twenty (20) west, in said county and State, which said mortgage was duly recorded in the register's office on January 20th, 1894, at 4 o'clock p. m., in Book Z of Mortgages, on page 353; that said
29 mortgage contained a stipulation for the payment of fifty dollars as an attorney's fee in case of foreclosure thereof. That said notes and mortgage were duly assigned to the plaintiff on November 10th, 1894, which assignment was duly recorded in the register's office on the 10th day of November, 1894 at 2 o'clock p. m., in Book Y of Mortgages on page 387.

Fifth. That on January 23rd, 1894, said defendants, Sawyer and wife, executed and delivered to the plaintiff the note and mortgage for twelve thousand dollars in that behalf set out in the complaint, covering and conveying all the lands first hereon described, excepting the undivided half of the west half of the northwest quarter of the southwest quarter of section twenty-eight (28), township one hundred and seven (107) north of range twenty (20), west, which said mortgage was duly recorded in said register's office on July 30th, 1894 at 8 o'clock a. m., in Book Z, of Mortgages on page 467, that said mortgage contained a stipulation for the payment of one hundred dollars as an attorney's fee in case of foreclosure thereof.

Sixth. That on February 19th, 1895, said defendants, Sawyer and his wife, executed and delivered to the plaintiff a deed of warranty with full covenants of all the lands hereinbefore described and on the same date and as part of the same transaction, said Sawyer and his wife, of the first part, and the plaintiff of the second part, and the defendant Woodman of the third part made and entered into the agreement of that date, set out in the complaint, and on the same date and as part of the same transaction the plaintiff executed and delivered to the defendants Nellie A. Sawyer, a
30 deed of conveyance of all said lands to her, which was placed in the hands of said Woodman in escrow, to be delivered on the conditions set out in the said agreement, in and by which agreement the making of said deeds is recited and it is provided that plaintiff should pay and take assignments to himself of all said other mortgages on said lands, or any part of them, not already owned by him. And that said defendants, Sawyer and his wife, should pay to the plaintiff one hundred dollars per month, payable on or before the last day of February, A. D. 1895, and on or before the last day of each and every month thereafter continuously. That the said deed so placed in the hands of said Woodman in escrow should be held by him in escrow until said Sawyer and his wife should pay to the plaintiff all said monthly payments and also said sum of twenty thousand and four hundred dollars, said twenty thousand four hundred dollars to be paid at such time or times as should be determined by the said Sawyer and his wife, they having the privilege of paying not less than fifty dollars at any time thereon, and provided that the said Sawyer and his wife should become entitled to the delivery to them or their assigns of said last-mentioned deed so held in escrow at any time whatever, provided only that they should continuously pay said one hundred dollars monthly and also pay the sum of twenty thousand four hundred

dollars as above. And provided further that upon failure by the said Sawyer and his wife to pay said monthly payments all their rights under said contract should cease and determine. That the said deed from Sawyer and wife to plaintiff was recorded in the register's office on the 7th day of May, A. D. 1895, at 5 o'clock
31 p. m., in Book 43 of Deeds at page 70.

Seventh. That afterwards on the 3rd day of July, 1895, the plaintiff did purchase the said Willis notes and mortgages of five thousand dollars, which was duly assigned to him by the mortgagee, which assignment was recorded in said register's office on September 6th, 1895 at 1 o'clock p. m., in Book Y of Mortgages at page 427.

Eighth. That the defendants, Sawyer and wife, made payments to the plaintiff of the monthly installments of one hundred dollars each for eleven consecutive months up to the 31st day of December, A. D. 1895, and then made default in such monthly payments, and has made no further payments either upon said contract or upon any of said mortgages on the notes secured thereby. That the said eleven hundred dollars paid in said monthly installments is by the court applied toward payment of the said mortgage of twelve thousand dollars originally running to the plaintiff as of the dates of their payment.

Ninth. That there is due at the date of these findings on the said Willis mortgage the sum of sixty-three hundred and twenty-six dollars and forty-two cents ($6326.42), besides the attorney's fee of seventy-five dollars stipulated therein. That there is now due at the date of these findings on the said Woodman mortgage the sum of fourteen hundred and seventy-five dollars and forty-six cents ($1475.46) besides the attorney's fee of fifty dollors stipulated therein. That there is now due at the date of these findings on the said Deats mortgage the sum of thirty-four hundred and eighty-three dollars ($3483) besides the attorney's fee of fifty dollars stipulated therein.

That there is now due at the date of these findings on the said
32 Piper mortgage the sum of thirteen thousand three hundred and eighty-eight dollars ($13,388) besides the attorney's fee of one hundred dollars stipulated therein.

Tenth. That all the notes secured by said mortgages were past due before the commencement of this action; and that before the commencement of this action the plaintiff did declare to the said Sawyer and his wife the forfeiture by them of their rights under said agreement by reason of their default in making said continuous monthly payments.

As conclusion of law the court finds:

That said transaction of February 19th, 1895 did not extinguish by merger or otherwise the said several mortgages and that default having been made in the conditions of said agreement of February 19th, 1895, the plaintiff is entitled to judgment of foreclosure of each of the said mortgages for the amounts so above recited to be severally due thereon and the several attorneys' fees therein stipulated besides the costs of this action and the costs of foreclosure sale and that such foreclosures be made by sale of the lands so covered by said mort-

gages severally in accordance with the statutes in such case made and provided subject to redemption according to law.

That said deed so delivered to and held by the defendant Woodman, in escrow, shall remain in his hands, as depositary during the time allowed by law for redemption from such foreclosure sales, or till redemption from such sales be made by said defendants, Sawyer and his wife, or either of them or their heirs or assigns; and in case of such redemption by them said deed to be delivered to them their heirs or assigns, but that if such redemption be not so made
33 by them, said deed shall, after the expiration of such period of redemption be cancelled and delivered up to the plaintiff and that plaintiff have judgment herein for his costs and disbursements of that suit.

Let judgment be entered accordingly.

THOMAS S. BUCKHAM,
District Judge.

Dated July 7th, 1897.

Motion for new trial on ground that findings — not supported by evidence and are contrary to law and that judgment of dismissal should have been ordered in defendants' favor. Denied.

STATE OF MINNESOTA, } ss:
County of Steele, }

District Court.

DANIEL S. PIPER, Plaintiff,
against
JOSEPH A. SAWYER ET AL., Defendants.

The foregoing-settled case, having been examined by me and found conformable to the truth, is hereby settled and allowed as the formal settled case herein. And I hereby certify that the same contains full, true and correct copies of all the pleadings, evidence, proceedings on the trial and of all motions exceptions and objections taken at the trial thereof, and of all motions and proceedings in said cause subsequent to the trial, save only defendants' motion for change in the findings and order of court thereon, which said motion and order is not included therein.

(Signed) THOMAS S. BUCKHAM,
District Judge, Steele County, Minnesota.

Filed Aug. 19, 1897.

G. W. PEACHEY, *Clerk.*

34 STATE OF MINNESOTA, } ss:
County of Steele, }

District Court, Fifth Judicial District.

DANIEL S. PIPER, Plaintiff,
against
JOSEPH A. SAWYER ET AL., Defendants.

The answering defendants herein now move the court that it make the following alterations in its findings of facts, heretofore made and filed herein, viz:

(1.) Strike out all that part of the sixth finding of fact after the words:

"They having the privilege of paying not less than fifty dollars "at any time thereon."

The same being the last lines of said findings. And insert in lieu of said portion the following, the same being the precise terms of said agreement, viz:

"It being agreed and understood that said parties of the first part "shall become entitled to the delivery to them or their assigns of "said deed held by said third party in escrow as above at any time "whatever, provided only that they continually pay said $100 "monthly and also pay the said sum of $20,400 in time and manner "as above. And it is further provided that said monthly payments "shall be diminished from and after any payments upon said "$20,400 in the same proportion which the sum or sums paid "thereon bear to said total sum of $20,400. Provided further, that "upon the failure of said parties of the first part to pay said monthly "payments all their rights hereunder shall cease and determine."

"2." From the ninth finding of fact strike out the several attorneys' fees therein stated.

35 (3.) From the ninth finding of fact strike out the words:

"Sixty-three hundred and forty-eight dollars and five cents, "($6348.05)." These same being the amount there found to be due upon the Willis mortgage, and insert in lieu of said words and sum, the following words and sum: "Sixty-two hundred and thirty dol- "lars and eighty-three cents, $6230.83."

(4.) Add the following finding of fact, viz:

"That the $20,400, stated in said Exhibit 'E' was at the time of "the execution of said contract mutually fixed upon and agreed "upon by the parties as the total sum owing to plaintiff by defend- "ants Sawyer, and included all that would become due plaintiff "when he had paid and taken an assignment of all said formal "mortgages, as therein provided. That the $100 payable monthly "to plaintiff by the terms of said contract was then fixed upon as "his interest upon said $20,400. That no other sum or sums than "those included in said four formal mortgages set forth in the com- "plaint, was included in said $20,400."

Add the following finding of fact, viz:

"That at the time of the execution and delivery of said Exhibit "'E,' it was the mutual intention and understanding of the parties

" thereto that the deed, Exhibit ' F,' the deed, Exhibit ' G,' and said " contract, Exhibit 8, were substituted for and thenceforth should be " considered as replacing said mortgages, together with the lien " thereof upon the lands therein described, so far as the rights of " said defendants are concerned, and that plaintiff is not en-
36 " titled to a foreclosure of either of said four prior mortgages."

Said defendants further move the court, that it strike out each and all of its findings of law in said cause, and instead thereof make and file its findings of law therein as follows:

I.

That the contract of February 19th, 1895, together with the deed by said defendants to this plaintiff and the deed delivered in escrow, (Exhibits " E," " F " and " G,") were each and all made, executed and delivered as parts of one transaction, and together constituted an equitable mortgage made by said defendants to this plaintiff. That thereby and therein a new principal sum was mutually fixed and agreed upon as the total sum and amount then owing to plaintiff by said defendants and secured by said equitable mortgage. That the same constituted a security other and different, and upon other real estate, than said former mortgages and the land mortgaged therein. That a different rate of interest was thereby fixed upon, and other and wholly different times and manner of payment of said mortgage lien, and of the sum secured thereby, was so fixed upon and settled.

II.

That said transaction of February 19th, 1895 extinguished each and all of said prior mortgages, together with the lien thereof upon the lands therein described so far as the rights of said defendants are concerned, and that plaintiff is not entitled to a foreclosure of either of said four prior mortgages.

III.

That plaintiff, having elected at the opening of this trial, not to accept a decree herein for the foreclosure of said equitable
37 mortgage, is not entitled to any relief herein.

IV.

That defendants, Joseph A. Sawyer and Nellie A. Sawyer, are entitled to a decree herein that said action be dismissed, and to recover from plaintiff their costs and disbursements herein. Let judgment be entered accordingly.

This motion is made upon the pleadings, transcript of evidence and all exhibits and files in this case and upon the files of this court in the former action between the parties hereto set out in the answer and reply herein, and in particular that part thereof included in plaintiff's motion for amended findings therein and for leave to file an amended complaint therein including said amended complaint therewith filed. True copies of which said motion, proposed

amended findings and proposed amended complaint are hereto attached.

Dated at Owatonna, Minnesota, this 28th day of July, 1897.

J. A. SAWYER,
Att'y for said Defendants.

STATE OF MINNESOTA, } ss:
County of Steele, }

District Court, Fifth Judicial District.

DANIEL S. PIPER, Plaintiff,
vs.
JOSEPH A. SAWYER, NELLIE A. SAWYER, and L. C. Woodman, Defendants. } Judgment.

The cause above entitled, being an action to have the agreement of February 19, 1895 set out in the complaint and hereinafter referred to, and the rights of said defendants, Joseph A. Sawyer, and Nellie A. Sawyer, under said agreement adjudged forfeited and determined, and to foreclose the several mortgages therein re-
38 ferred to, and hereinafter recited, foreclosed, was duly tried by the court, at the court-house in said county on the 2nd day of June, A. D. 1897, during the regular June term of said court then in session, and the findings and decision of the court therein have been duly made and filed, directing the entry of judgment as herein set forth; and the plaintiff's costs and disbursements herein having been duly taxed and allowed.

Now, therefore, on motion of Messrs. Wheelock & Sperry, and Robert Taylor, attorneys for said plaintiff, it is hereby adjudged and decreed as follows:

First. That the said agreement of February 19, 1895, fully set forth in the complaint herein, and the transaction of which it was a part, did not and does not extinguish by merger or otherwise any of the notes and mortgages therein and in the complaint and findings and hereinafter set forth; that default has been made in the terms and conditions of said agreement, as in said complaint and findings recited, and that said agreement and the rights of the said Joseph A. Sawyer and Nellie A. Sawyer, thereunder be and they are determined, and have ceased.

Second. That upon the mortgage bearing date the 21st day of July, A. D. 1890, executed and delivered to Sarah L. Willis, mortgagee, by said Joseph A. Sawyer and Nellie A. Sawyer, his wife, as mortgagors, covering and conveying the following-described lands situated in said Steele county, to wit: The southwest quarter of the southwest quarter, and the east half of the southwest quarter, and the west half of the southwest quarter of the southwest quarter, and the west half of the northwest quarter of the southeast quar-
39 ter, of section twenty-one (21), and the northwest quarter of section twenty-eight (28), and the southeast quarter of the northeast quarter, and the undivided half of the southwest quarter of the southwest quarter, of section twenty-nine (29), all in township

one hundred and seven (107) north, in range twenty (20) west; and recorded in the office of the register of deeds, of said county, on the 9th day of September, A. D. 1890 at 9 o'clock a. m., in Book U of Mortgages, at page 174, and containing a stipulation for the payment of an attorney's fee of seventy-five dollars, in case of foreclosure thereof, which mortgage and the note secured thereby were, on the 3rd day of July, A. D. 1895, duly assigned to said plaintiff, Daniel S. Piper, and such assignment thereof was duly recorded in the office of said register of deeds on the 6th day of September, A. D. 1895, at 1 o'clock p. m. in Book Y of Mortgages at page 427; and upon the said note secured thereby, there is due from said defendants, Joseph A. Sawyer and Nellie A. Sawyer, the sum of six thousand three hundred and seventy-eight and $\frac{08}{100}$ dollars as principal and interest, and said seventy-five dollars, stipulated attorneys' fees, as aforesaid, and the further sum of twenty-nine and $\frac{60}{100}$ dollars, costs and disbursements of this action taxed and allowed as aforesaid.

And it is further adjudged and decreed that all of said mortgaged premises so covered by said mortgage, or so much thereof consisting of distinct tracts as may be sufficient to satisfy the amount due the plaintiff as aforesaid, including said $75 of stipulated attorneys' fees and said $29.60 costs of this action, be sold in separate parcels at public auction, within the said county of Steele where
40 said premises are situated, by the sheriff of said county, or his deputy, according to the provisions of law relating to sales of real estate on execution. That said sheriff give public notice of the time and place of such sale according to law. That said plaintiff may become the purchaser at such sale if he shall be the highest bidder thereat; and that the sheriff make due report to the court for confirmation — such sale when made, and execute and deliver to the purchaser or purchasers at such sale the usual certificate as provided by law. That out of the proceeds of such sale, after deducting the amount of his fees and disbursements on such sale, the sheriff pay to the plaintiff's attorneys the sum of seventy-five dollars, the stipulated attorneys' fees aforesaid, and the further sum of twenty-nine and $\frac{60}{100}$ dollars, the costs and disbursements aforesaid, with interest on said sums from date hereof; and also the said amount adjudged to be due to plaintiff upon said note and mortgage as aforesaid, with interest thereon from date hereof, if such proceeds of such sale be sufficient for that purpose; and if there be any surplus moneys that he bring the same into the court to abide the further order of the court. And it is further adjudged and decreed that said defendant- and all persons claiming under them be thereupon forever barred and foreclosed of all right, title and equity of redemption, in and to said mortgaged premises so sold and every part thereof, except only the right of redemption from such sale, according to law.

Third. That upon the mortgage bearing date the 1st day of April, A. D. 1892, executed by said Joseph A. Sawyer and Nellie A. Sawyer, mortgagors, to L. C. Woodman, mortgagee, covering and
41 conveying the following-described lands in said county, to wit: the north half of the northeast quarter of section thirty-two

(32) in township one hundred and seven (107) north, range twenty (20) west; and recorded in the office of said register of deeds on the 7th day of November, A. D. 1892, at 2 o'clock p. m., in Book Z of Mortgages at page 91, containing a stipulation for the payment of fifty dollars as an attorney's fee in case of foreclosure; which mortgage was on the 31st day of January, A. D. 1895, with the note secured thereby duly assigned by said Woodman to the said plaintiff, and such assignment was duly recorded in said register's office on February 5th, 1895, at 2 o'clock p. m., in Book Y of Mortgages at page 394; and upon the said note secured thereby, there is due from said defendants to said plaintiff the sum of one thousand four hundred and eighty-seven and $\frac{45}{100}$ dollars, as principal and interest, and said fifty dollars, stipulated attorneys' fees. And it is further adjudged and decreed that said last-described mortgaged premises, or so much thereof as may be sufficient to satisfy the amount due the plaintiff as aforesaid upon said last-described mortgage, including said fifty dollars of stipulated attorneys' fees, be sold at public auction, within said county where said premises are situated by the sheriff of said county, or his deputy, according to the provisions of law relating to sales of real estate on execution after giving public notice of the time and place of such sale according to law; and that said plaintiff may become the purchaser at such sale. That the sheriff make report of such sale to the court for confirmation, and execute and deliver to the purchaser thereat the usual certificate, as provided by law. That out of the proceeds of such sale, after deducting
42 the amount of his fees and disbursements on such sale, the sheriff pay to the plaintiff's attorneys the said sum of fifty dollars, said stipulated attorneys' fees, with interest thereon from the date hereof, and also the said amount adjudged to be due to plaintiff upon said last-named note and mortgage as aforesaid, with interest thereon from the date hereof, if such proceeds of such sale be sufficient therefor; and if there be any surplus moneys that he bring the same into court to abide the further order of the court. It is further adjudged and decreed that said defendants and all persons claiming under them be thereupon forever barred and foreclosed of all right, title and equity of redemption in and to said mortgaged premises so sold and every part thereof, except only the right of redemption from such sale according to law.

Fourth. That upon the mortgage bearing date the 1st of November, A. D. 1893, executed by said Joseph A. Sawyer and Nellie A. Sawyer, mortgagors, to August Deats, mortgagee, covering and conveying the following-described lands in said county, to wit: the north half of the northeast quarter, the southwest quarter of the northeast quarter, and the north half of the southwest quarter, of section twenty-nine (29) in township one hundred and seven (107) north, of range twenty (20) west, and recorded in the office of the said register of deeds on the 20th day of January, A. D. 1894, at 4 o'clock p. m., in Book Z of Mortgages, at page 353, containing a stipulation for the payment of fifty dollars as attorney fees, in case of foreclosure; which mortgage was, on the 10th day of November, A. D. 1894, duly assigned with the note secured thereby, by said

Deats to the plaintiff, and such assignment was duly re-
43 corded in said register's office, on said 10th day of November, A. D. 1894, at 2 o'clock p. m., in Book Y of Mortgages, at page 387; and upon the note secured thereby there is due from said defendants to the plaintiff the sum of three thousand five hundred and eleven and $\frac{43}{100}$ ($3511.43) dollars, as the principal and interest, and said fifty dollars, stipulated attorneys' fees. And it is further adjudged and decreed that said last-described mortgaged premises, or so much thereof consisting of distinct tracts as may be sufficient to satisfy the amount due the plaintiff as aforesaid upon said last-described mortgage including said fifty dollars of stipulated attorneys' fees, be sold at public auction within said county, where said premises are situated, by the sheriff of said county or his deputy, according to the provisions of law relating to sales of real estate on execution, after giving public notice of the time and place of such sale according to law; that said plaintiff may become the purchaser at such sale; that the sheriff shall make due report of such sale to the court for confirmation, and execute and deliver to the purchaser thereat the usual certificate as provided by law. That out of the proceeds of such sale, after deducting the amount of his fees and disbursements on such sale, the sheriff shall pay to the plaintiff's attorneys the said sum of fifty dollars, stipulated attorneys' fees, with interest thereon from the date hereof, and also the said amount adjudged to be due to said plaintiff upon said last-named note and mortgage as aforesaid, with interest thereon from the date hereof, if such proceeds be sufficient therefor; and if there be any surplus moneys, that he bring the same into court to abide the further
44 order of the court. It is further adjudged and decreed that the said defendants and all persons claiming under them be thereupon forever barred and foreclosed of all right, title and equity of redemption in and to said mortgaged premises so sold and every part thereof, except only the right of redemption from such sale according to law.

Fifth. That upon the mortgage bearing date the 23rd day of January, A. D. 1894, executed by said Joseph A. Sawyer and Nellie A. Sawyer, mortgagors, to said plaintiff, Daniel S. Piper, mortgagee, covering and conveying all the following-described lands situated in said Steele county, to wit: the south half of the southwest quarter the northeast quarter of the southwest quarter and the west half of the west half of the southeast quarter of section twenty-one (21), and the northwest quarter of section twenty-eight (28) and the northeast quarter and the north half of the southwest quarter, and the undivided half of the southwest quarter of the southwest quarter, of section twenty-nine (29) and the north half of the northeast quarter, and the north half of the northwest quarter, and the southwest quarter of the northwest quarter of section thirty-two (32) all in township one hundred and seven (107) north, in range twenty (20) west; and recorded in said register's office on the 30th day of July, A. D. 1894, at 8 o'clock a. m., in Book Z of Mortgages, at page 467, containing a stipulation for the payment of one hundred dollars as an attorney's fee in case of foreclosure thereof;

and upon the note secured thereby, there is due from said defendants to the plaintiff the sum of thirteen thousand four hundred and ninety-seven and $\frac{33}{100}$ dollars as principal and interest, and
45 said one hundred dollars stipulated attorneys' fees. And it is further adjudged and decreed that said last-described mortgaged premises, or so much thereof consisting of distinct tracts as may be sufficient to satisfy the amount due the plaintiff as aforesaid upon said last-named note and mortgage, including said one hundred dollars of stipulated attorneys' fees, be sold at public auction, within said county, where said lands are situated, by the sheriff of said county, or his deputy, according to the provisions of law relating to sales of land on execution, after giving notice of the time and place of such sale according to law; that such sheriff shall make due report of such sale to the court for confirmation, and make and deliver to the purchaser the usual certificate as provided by law. That out of the proceeds of such sale, after deducting his fees and disbursements in such sale, the sheriff shall pay to the plaintiff's attorneys said sum of one hundred dollars, stipulated attorneys' fees, with interest from this date, and also said amount adjudged to be due plaintiff upon said last-named note and mortgage, with interest from this date, if such proceeds be sufficient therefor; and if there be any surplus moneys, that he bring the same into court to abide its further order herein. It is further adjudged that said defendants and all persons claiming under them be forever barred and foreclosed of all right title and equity of redemption in and to said mortgaged premises so sold, and every part thereof, except only the right of redemption from such sale according to law.

Sixth. That the deed (in escrow) from said plaintiff to defendant, Nellie A. Sawyer, referred to in the complaint and in said findings, remain in escrow till the expiration of the period allowed by
46 law for redemption from such sales, or till redemption therefrom be made by said defendants, Joseph A. Sawyer and Nellie A. Sawyer, or either of them, or their heirs and assigns; and in case of such redemption by them said deed to be delivered to them, otherwise to be cancelled and delivered up to plaintiff; and that plaintiff recover his said costs and disbursements so taxed herein

Dated this 19th day of August, A. D. 1897.

[SEAL.] G. W. PEACHEY,
Clerk of said District Court.

STATE OF MINNESOTA, } ss:
County of Steele, }

District Court, Fifth Judicial District.

DANIEL S. PIPER, Plaintiff,
against
JOSEPH A. SAWYER, NELLIE A. SAWYER, and L. C. WOODMAN, Defendants.

To Messrs. Wheelock & Sperry and Robert Taylor, Esq., attorneys for the above-named plaintiff, and to G. W. Peachey, Esq., clerk of the court for said Steele county:

Please take notice, that the above-named defendants, Joseph A. Sawyer and Nellie A. Sawyer, appeal to the supreme court of the State of Minnesota from the judgment of said district court entered herein on the 19th day of August, A. D. 1897, and from the whole thereof. Reviewing also the order in said cause denying a new trial, made and entered in said cause by said district court and filed in the office of said clerk of court on the 19th day of August, A. D. 1897, and from the whole thereof.

47 Dated at Owatonna, Minnesota, this 14th day of February A. D. 1898.

J. A. SAWYER,
Attorney for said Defendants and Appellants.

Due service of the above notice of appeal is hereby admitted at Owatonna, Minnesota, this 14th day of February, 1898.

WHEELOCK & SPERRY,
Attorneys for Plaintiff.

Due service of the above notice of appeal is hereby admitted at Owatonna, Minnesota, this 14th day of February, 1898.

G. W. PEACHEY,
Clerk of Court.

Bond of appeal, duly approved by Hon. Thomas S. Buckham, district judge duly served upon plaintiff's attorneys and filed in said clerk of court's office on the 14th day of February, 1898.

48 STATE OF MINNESOTA:

Supreme Court, April Term, 1898.

DANIEL S. PIPER, Plaintiff and Respondent,
against
JOSEPH A. SAWYER ET AL., Defendants; JOSEPH A. SAWYER ET AL., Appellants.

Appellants' Brief—Assignment of Errors.

I.

The court erred in finding that the four mortgages sued upon were not extinguished by the deed and agreement of Feb. 19th, 1895.

II.

The court erred in ordering those mortgages to be fore-
49 closed and the land sold to satisfy the amount found due upon them with attorneys' fees, etc.

III.

The court erred in not finding that the equitable mortgage of Feb. 19th, 1895, was given and received in lieu and extinguishment of all former securities.

IV.

The court erred in not so construing the contract of Feb. 19th, 1895 as an absolute agreement on the part of respondent, to buy in the outstanding mortgages for the total sum, including all due on those then held by him, of the $20,400 secured by the equitable mortgage then taken by him.

V.

The court erred in not ordering judgment of dismissal.

VI.

The court erred in including in the amount it found due on the Willis mortgage interest from maturity on the several interest coupons, and the judgment is erroneous in including such interest upon interest.

VII.

The court erred in finding due the plaintiff any greater sum than the $20,400 with interest thereon accrued since January, 1896, and in ordering the lands sold to satisfy any greater sum, with costs of suit and sale, and the judgment is erroneous in like manner.

VIII.

The court erred in overruling appellants' objection to the notes and mortgages.

Statement of Facts.

Feb. 19th, 1895 the plaintiff held a mortgage on the prem-
50 ises in controversy, except one tract of ten acres, of $12,000, interest at 6 per cent., which mortgage was a first lien on part of such premises only, being subject to the others mentioned as to the other portions of the land. He then also held by assignment other of such mortgages, all then due. No showing is made either in the pleadings or evidence as to whether he then had taken assignments of more than one of the three such mortgages other than such presumption as may flow from the dates of the assignments. In all, there were four mortgages, three being on parts of the land included in the mortgage to plaintiff; of the four, interest on two was at 6 per cent., on one at 7 per cent. and on the other at 8 per cent.;

all save the Willis mortgage were then due, this W. mortgage maturing in the following July.

On that day the parties entered into the agreement set forth in the complaint, and as part of the one transaction, appellants executed and delivered to respondent a deed of warranty conveying all the lands included in any of the former mortgages, with another tract of ten acres on which there was then no lien—all owned by appellants; also respondent executed and delivered in escrow to defendant Woodman, a deed of special warranty conveying to appellant all said lands, with covenants of special warranty against respondent and those claiming under or through him. All this was done in express performance of the terms of the contract then made. Its principal conditions are, that such deeds should be executed and so delivered, the consideration of each being the $20,400, that appellants should pay to respondent the sum of $100 monthly thereafter, and the principal sum of $20,400 whenever they might desire
51 so to do, payments of $50 or more permissable at any time—certain taxes to be paid by each, insurance to be kept on the buildings. The monthly payments to be reduced proportionately upon payments on the $20,400, avails of the insurance, if any to be applied on the $20,400 if appellants paid balance, the deed left with Woodman to be delivered to appellants at any time whatever, "pro- "vided only that they continuously pay said $100 monthly and also "pay said $20,400 in time and manner as above; provided further "that upon the failure by said party of the first part to pay said "monthly payments, all their rights hereunder shall cease and de- "termine."

Thereafter, and in July, 1895, respondent took an assignment of the Willis mortgage then due. Appellants kept up the monthly payments to and including that payable in December, 1895, then defaulted. They have paid nothing on the principal. After such default, as shown and admitted in the answer and reply, respondent brought an action in ejectment, upon this contract, claiming the absolute ownership of all the lands under such deed and contract, in which he was defeated—the court finding the transaction constituted an equitable mortgage for the $20,400. Thereafter the present action was brought, for foreclosure of all the prior mortgages, including the extra interest, attorneys' fees, etc. At the opening of the trial appellants in open court offered to consent to a judgment of foreclosure of the equitable mortgage, or for the sum due thereon, which offer was expressly refused by respondent. The offer was thereafter withdrawn.

Respondent offered the several notes, mortgages and assign-
52 ments with the records thereof, the contract and both deeds, the notes, mortgages and assignments thereby objected to by appellants, on the ground that these securities were extinguished by the equitable mortgage and contract of Feb. 19th, '95. Objection overruled and exception. Testimony of defendant Woodman that he then held the escrow deed, as under the terms of that contract. On request, the default, with demand of respondent thereupon, was admitted by appellants. Respondent then rested.

Appellants offered no evidence, but submitted the case on plaintiff's showing and the pleadings.

Appellants' Position.

I.

The contract and deeds of Feb. 19th, '95 constitute an equitable mortgage, securing payment of the $20,400 therein mutually agreed upon as the total due respondent.

II.

For that sum respondent agreed to buy in the outstanding mortgages; it also included all moneys due on those he then held.

III.

But if no such agreement by him, then he held the excess over the agreed sum due on the securities then held by him, as trustee for appellants—to be expended on buying in those outstanding. He neither shows in his complaint, or evidence, the ground of moneys paid out, nor shows how much he did pay out for such. There is no presumption that he paid face value, for the contract sets out in terms the total amount on all, and in this complaint he avers that the $20,400 was then "estimated" to be the value of all.

If such be the position of respondent, then the complaint
53 does not state facts, nor the evidence contain facts, sufficient to constitute the asserted cause of action.

IV.

Notwithstanding this equitable mortgage to respondent for the total amount due on all the securities, appellants then owed to the holders of the outstanding mortgages, the sums unpaid thereon, and as to the lands, both this equitable mortgage, and such outstanding securities constituted liens thereon. The latter remained, as to such holders, unaffected.

It is plain, and plaintiff so avers in his complaint herein, that he "has taken an assignment—of said other notes and mortgages—pursuant to said agreement." Fo. 32. His rights thereunder, therefore, are defined by this contract. Also it is plain that the parties intended all these securities, other than the equitable, to stand alike or fall together, when in respondent's hands.

V.

Under the contract, at most, he can assert no claim for more than the $20,400 with interest.

VI.

Both by construction of the contract, and by the evident intention of the parties, the equitable mortgage was taken in lieu of, and extinguished the old securities in plaintiff's hands, as against appellants.

VII.

The forfeiture clause in the contract, coupled with the default admitted, did not in any manner terminate appellants' position and rights under the contract. It only terminates their right to a delivery of the escrow deed, and to the unlimited time of payment of the principal sum.

54

VIII.

Respondent having sued on those mortgages only, and having expressly refused to take a decree for the relief he was entitled to on the facts, but not by his pleadings, cannot now, on appeal shift his position, and claim to be entitled in this action to a decree for foreclosure of the equitable mortgage.

Points and Authorities.

The contract and deeds of Feb. 19th '95 constitute an equitable mortgage.

I understand plaintiff's counsel to admit this, but if not, still it is well settled that such is the fact.

Marshall *vs.* Thompson, 39 Minn., 137
Heaton *vs.* Darling, Minn. 68 N. W. R., 1088.
Niggeler *vs.* Maurin, 34 Minn., 118.

As such it is for the agreed sum of $20,400. This included the repayment to respondent for the moneys to be paid out by him to buy in the other mortgages. In other words, he was paid in advance, and assumed the risk, on one hand, and the advantage on the other, of getting them in for less, or having to pay more. All save one was then due, that one had but five months to run. Plainly another loan is here made and secured.

Having, as he alleges, taken in the outside securities "in pursuance of the contract" his rights thereunder are fixed by the contract and not by the mere assignment. He can assert none save under the contract.

Renshaw *vs.* Taylor, 7 Oregon, 315.
1 Jones Mortgages, sec. 931.

55 By the express terms of the contract, the deed to respondent, and the payment of the $20,400 there provided to be made, are "in consideration of the agreements herein contained on the part of second party (respondent) to be kept and performed." And "in consideration that second party has taken and herewith does pay and take assignment to himself of all other mortgages upon said lands."

Respondent alleges in his complaint that he has performed these agreements—"pursuant to said contract." I think these provisions constitute an express agreement by respondent to "pay, and take assignment" of those mortgages for the agreed sum of $20,400. But if not an express, it is at least plainly an implied agreement by

him so to do. It will be noted, that as is *is* usual in such cases, the contract is explicit in defining the duties of the debtors, while many of those of the creditor are left to inference.

On any other hypothesis than such agreement, respondent would hold the excess of moneys in trust, and could not speculate with such moneys. He does not claim to have paid out more than the $20,400 if as much—to allow him to recover more is to protect him in an attempt to speculate therewith. Besides his complaint states no such cause of action, as an excess payment.

Further: This contract was, and was intended to be one both operating and enforcible *in presenti*. Default by appellants was followed at once by the prescribed penalty. Had such default occurred prior to the assignment to respondent of the other mortgages, he could instantly avail himself of all remedies it provided. Plainly he could at once proceed to foreclose this equitable mortgage—but could by no possibility foreclose any he had not bought in. In that
56 case appellants could redeem by paying that entire amount and then compel plaintiff to pay and satisfy the outstanding mortgages. Or had the holders of such mortgages foreclosed thereon prior to any default to respondent by appellants, they could pay off such mortgages, and compel the application of the amount so paid upon the respondent's equitable mortgage, in payment *pro tanto*.

Again: The contract requires respondent to convey, upon full payment of the $20,400, the lands to appellants by deed containing covenants of warranty against him and all claiming through or under him. The deed he did execute is such in character and was made and executed at that time. Such conveyance by no possibility could leave any claim of lien upon the premises in him, or under either of the mortgages he had held. There is no intimation anywhere, that he could any more retain a personal claim under the notes, than a lien on the land under the mortgages. If not expressly so provided, the inference is clear and indisputable that the payment of the $20,400 with the agreed interest would be a payment in full of all respondent's claims, either as against the land or against appellants personally. It will be noted that the interest or monthly payments aggregate $1,200 annually, or six per cent. per annum on the entire sum, the same rate as was provided in the original mortgage of $12,000 to respondent, and in the $3,000 Deats mortgage, then held by him.

Being thus limited, obviously it could be of no possible interest to respondent no default by appellants occurring, whether or no he took assignments of, or paid off and had satisfied, the other mortgages except only as against possible adverse claims by third parties. As against such, mechanics' liens for instance, he would
57 be protected. But to respondents it was of interest that these mortgages should not be satisfied of record. They could not take assignments to themselves, hence the provision for assignment to respondent.

Until now I am unable to ascertain respondent's position, whether it is that the new, equitable mortgage was merely additional security, or that the contract effectuated only the forbearance by him to

exercise his rights under the old mortgage so long only as no default occurred. I therefore consider both positions.

As to the forbearance theory, it necessarily rests upon the assumption that the contract does not provide that payment of the $20,400 and interest was to be payment in full. This being not a fact, the theory fails. If it be said that the contract merely extends the maturity of those mortgages, this is but a different form of assertion of the collateral theory.

The assumption that merely collateral, or additional security was intended is effectually rebutted, in the absence of default by appellants, by the fact above shown, that respondent agreed to and did make a new loan—that he agreed to, and did in fact, buy in the outstanding mortgages for the agreed amount stated in the contract, which also included the entire amount due by agreement on the mortgages then held by respondent.

Further, it should be noted that by an express understanding the total sum due, or to become due, to respondent, is fixed,—all demands, present and prospective, are fixed—and reduced to the stated amount. A single rate of interest is agreed upon for this sum. New periods of payment are stated. Entirely different results consequent upon default, are provided. An entirely different method of satisfaction of the mortgage is fixed upon, and in part con-
58 summated by the delivery of the escrow deed. The transaction is wholly new, and clearly the result of mutual compromise, intended to merge all former and prospective rights and duties of all parties to it.

"The taking of a new note and mortgage by the mortgagee from "the mortgagor for the same debt and upon the same lands would "not discharge the lien of the first mortgage—this would be other- "wise if the second debt was created by the parties getting together "and having a settlement of mutual running accounts and other "debts, among which was the first mortgage debt, and a balance is "found due the plaintiff—this balance being put in a new note and "mortgage—that would form a new consideration, and the lien of "the first mortgage would be divested or if at that time it was the "understanding of the parties that the new was to be in full satis- "faction of the old mortgage, that would operate as a cancellation "of the first mortgage."

Walters *vs.* Walters, 75 Ind., 425–429.
1 Jones Mortgages, sec. 931.
2 Pingrey Mortgages, secs. 472–1171.
Newman *vs.* Kling, 17, So. Rep., 685.

Here we have all the essentials, and more, above. The meeting of the minds of the parties in a new settlement, a new loan and on other lands in part, and an adjustment not only of the amount due on claims then held by respondent, but for future acts and payments to be made by him.

The then intention of the parties, (not the interest of the creditor) is the test.

"It is however competent for the parties to agree that a
59 "change in the form of the mortgage debt shall operate as a "payment of the debt, although the mortgage be not cancelled in form. The question of intention in such cases always "comes in with controlling force and the intention may operate as "well to extinguish the debt as to keep it alive. If a note be taken "with the intention that it should operate as payment in whole or "in part of the debt, then the mortgage is accordingly paid in whole "or in part as the case may be.

2 Jones Mortgages, sec. 926. Cited and applied in.
Joyner *vs.* Stancill, 12 S. E. R. 912. (Sup. Ct. of N. C., 1891.)

It is settled that this intention may be deduced from the writings aided by the circumstances, and need not be expressly stated.

Plainly here, appellants never expected to pay any sum over the agreed $20,400. Unless upon default, respondent could not suppose he was entitled to more.

It appears that even in case of default by appellants, neither party then understood or expected to pay the old mortgages, nor that they were enforcible as against appellants. It cannot matter at what time such default might occur. And it is only a default in making the monthly payment of interest which is provided for. By the express terms of the contract, if these were kept up the principal sum could run indefinitely. Such default might occur when nearly all this principal had been paid—years may have elapsed—the additional interest, computed on the old mortgages has run up into the thousands—indeed the more nearly appellants paid up the greater the difference between the two amounts.

60 What is respondent's measure of damages, upon the breach by appellant?

Plainly, that he recover the amount he would have received had no default occurred, save only the enforcement of his equitable mortgage for that sum.

Now there is nothing in the contract nor in the facts tending to show any different understanding, unless it be the clause of forfeiture, that appellants' "rights hereunder shall cease and determine," and the presumption is very strong in any case that these words were not then understood as requiring payment in such case by appellants of indefinite thousands of dollars more than the agreed sum.

These words are no more than the usual expression of forfeiture in a mortgage or contract of sale. Even had it been expressed to the effect that upon default by them all appellants' rights under the contract should be null and void or should cease and determine, it could not affect their rights to pay off the entire agreed sum and that such payment be taken as in full. Once a mortgage, always a mortgage.

Holton *vs.* Meighen, 15 Minn. 70–79.
Marshall *vs.* Thompson, 39 Minn. 137–141.
Meighen *vs.* King, 31 Minn. 115*d*–118.

But by the express terms of this contract it does not purport that all appellants' rights should so terminate, but only that their right to the deed to them should then cease. That deed was delivered in escrow, its delivery to them by the depository was so limited.

Respondent has ever treated this contract as in force; and in this action or his demand the court ordered relief to him based solely upon this deed and contract, to wit, the ownership of the ten acres of land, upon which respondent has no claim save under
61 this contract. And upon default by appellants, instead of trying to enforce any of the mortgages, respondent brought action in ejectment for all these lands, claiming to be their owner under this very contract. It can hardly avail now that he claim this contract expired on such default.

If, as seems likely, respondent thought that under the contract, upon default in the payments there provided, he at once became the owner of all lands, it is not possible that he then understood he could also retain the four mortgages with the personal claims against appellants contained in the four notes.

This settlement was an account stated. An accord and satisfaction.

The entire sums, including these mortgages held by respondent, being stipulated to leave due to plaintiff, on his buying in the other mortgages, constituted an account stated, and released the mortgages.

Christofferson *vs.* Howe, 57 Minn. 67.
Hanley *vs.* Noyes, 35 Minn. 174.

The new agreement of Feb. 19th, being upon full consideration, and then so far executed that it operated in the minds of the parties as a settlement and satisfaction of the prior mortgages, it must be regarded as a valid accord and satisfaction, whether or not the new mortgage and amount so agreed upon be paid or not, and respondent was thenceforth confined to an action on the equitable mortgage.

"This may be done by surrender of the former securities, by "lease or receipt in full, or in any other mode."

Babcock & Russell *vs.* Hawkins, 23 Vt. 561–563.

62 Respondent took the new settlement and equitable mortgage in satisfaction and did not merely agree to accept payment of that sum as such.

2 Chitty Contracts (11 Am. ed.) 1124.
Gulf R'y *vs.* Harriett, 15 S. W. R. 557.
See Hosler *vs.* Hirsch, 151 Pa. St. 415–25 At. R. 52.

II.

Respondent is not entitled, in this action, to a foreclosure of the equitable mortgage.

He elected to bring action only for foreclosure of the old mortgages, and tried the case below solely on that theory and claim. Now, on appeal, he cannot be permitted to shift his ground, and demand other relief. He also on the trial below, expressly declined

to accept such relief, then offered him, though his complaint did not entitle him to claim it.

Rowell *vs.* Marcy, 47 Vt. 32.
Woodbridge *vs.* Sellwood, Minn. 67 N. W. R. 700–800.
Peteler Co. *vs.* Adamant Co., 60 Minn. 127.

"A plaintiff can succeed only upon the case made by his com-
"plaint, and not upon a different one. His evidence must prove
"the substance of the issue tendered by his pleading—as he will fail,
"no matter what else he may prove."

Bremmermann *vs.* Jennings, 101 Ind. 257 and cases cited.
4 Enc. Pl. & Pr., 601–602 and cases cited, notes.
O'Brien *vs.* St. Paul, 18 Minn. 176.
Benson *vs.* Day, 40 Minn. 445.
Dennis *vs.* Spencer, 45 Minn. 250.

In Hatch *vs.* Coddington, 32 Minn. 94–95, the court, by Mitchell judge, say—

"The relief granted must be upon facts established by the
63 "evidence, admissable under the complaint, and consistent
"with the case made by the complaint." (In italics in the opinion.)

Crosby *vs.* Farmer, 43 Minn. 462 is consistent. There the ground of the relief granted was held to be "consistent with the case made."

S. W. Eddy Stock Co. *vs.* Blackburn, (C. C. A.) 70 Fed. R. 949.
Cook *vs.* Arnold, 36 S. W. R. 343. 27 Ala. 337–38 Ala. 627.

Respondent cannot complain though his action be dismissed. He first brought suit in ejectment and for damages, in which the contract and deed here involved was decided to constitute an equitable mortgage, shown by the pleadings herein. He then voluntarily and advisedly entered a court of equity upon claims.

First. Of a personal liability, which he had, upon full consideration, released.

Second. Demand for attorneys' and foreclosure fees in each of the four mortgages, to avoid which (in part) the new mortgage was executed, and thereby the parties had expressly excluded.

Third. A demand for more than two thousand dollars of principal over the amount fairly agreed upon.

Fifth. Rates of interest largely in excess of that mutually fixed upon. If, through desire to obtain these inequitable amounts, he fall outside the walls, no blame can attach.

See 1 Am. Eng. Enc. Law, 457, note bottom page.
Rowell *vs.* Marcy, 47 Vt. 627.

The results of enforcement of the older security, being thus unjust and inequitable, equity will not allow such enforcement, but
64 will consider them extinguished.

Star *vs.* Ellis, 6 John. Ch. 393–'5.
1 Jones Mortgages, sec. 863, 864.
Note 5 Am. St. Repts. p 706.

III.

There being no evidence of any demand for payment of the interest coupons at or after maturity, it is error to include in the amount found due thereon, interest on those coupons. Appellants move the court below to exclude such interest. Denied.

It is submitted that the judgment appealed from should be reversed, and the action dismissed.

J. A. SAWYER,
Att'y for Appellants.

65 IX.

Error in the first subdivision of the judgment (fo. 169 P. B.) in that it is there adjudged, "The said agreement of Feb. 19th, 1895, and the rights of said Joseph A. Sawyer and Nellie A. Sawyer thereunder, be and they are determined and they have ceased."

X.

The court erred in ordering the deed held in escrow, (fo's 126 to 130) to be cancelled and delivered up to plaintiff in case of no redemption, and this error is included in the judgment in that such delivery and cancellation is therein adjudged. (fo. 192.)

66 STATE OF MINNESOTA:

Supreme Court, April Term, 1898.

DANIEL S. PIPER, Plaintiff and Respondent,
against
JOSEPH A. SAWYER ET AL., Defendants; JOSEPH A. SAWYER *et al.*, Appellants.

Appellants' Reply Brief.

I.

Respondent's demand, that in case the judgment appealed from be not sustained, they be allowed to demand in this action a
67 foreclosure of the equitable mortgage, involves an attempted total change of base on his part, and is inadmissible.

He not only did not seek such foreclosure in the court below, but planted himself upon grounds wholly antagonistic to those requisite to such relief. The theory of his case is that no such mortgage exists—that the contract of Feb. 19th, and all appellants' rights thereunder had "wholly ceased and determined." This is alleged in the complaint, found as a fact in the findings and in set terms embodied in the judgment. In the complaint, (fo. 21) he avers that the four formal mortgages, therein prayed to be foreclosed, constitute all the mortgages on the lands at any time at or since the date of the contract. Also, (fo. 34) "that before the commencement of this action "plaintiff did declare to said Sawyers the forfeiture by them of all "their rights under said agreement, and that they had ceased as

"provided for—and did demand of them possession of said lands, "and did demand of said L. C. Woodman the delivery up of said "deed of escrow." He claimed nothing under the equitable mortgage. The relief prayed for is, (1) that the old mortgages were due and payable. (2) Judgment for the several sums claimed to be due thereon with the four attorneys' fees; (3) a strict foreclosure of those securities, or, (4) a sale of the lands to satisfy such mortgages only. While in terms he did pray—"judgment of foreclosure of said con- "tract and all said mortgages," he makes plain just what he does demand, as to the equitable mortgage by the terms immediately following, viz.: "Forever barring said parties of all right, title and "interest in all said lands." The only relief sought as to that
68 mortgage thus being a judgment of forfeiture of all rights under that contract. Also, at the trial, when offered a judgment of foreclosure of that mortgage without contest, he expressly refused to accept it.

This identical theory is carried into the findings and judgment, both drawn by respondent's counsel. The findings set forth the several sums due by the terms of the formal mortgages, but nothing as to the sum secured by the equitable lien. Then recite the making of the contract with the two deeds. Then, (fo. 146), "And pro- "vided further, that upon failure by said Sawyer and his wife to "pay said monthly payments all their rights under said contract "should cease and determine." Then, (fo. 150), the declaration of forfeiture by plaintiff to appellants of all rights in them under the contract.

In the first clause of the judgment, (fo. 169), is the following adjudication—"That default has been made in the terms and condi- "tions of said agreement, as in said complaint and findings recited, "and that said agreement and the rights of said Joseph A. Sawyer "and Nellie A. Sawyer, thereunder be, and they are determined and "have ceased." Paper Book, p. 57.

Now all this is not merely casual. It is in necessary sequence to respondent's primal position—viz: that he is entitled to foreclose the formal mortgages. The equitable mortgage is definite security for the $20,400 specified therein, and for no other sum. The formal mortgages secure wholly different amounts. It is not here a question of liens, primarily, but of the amount secured. The liens are only incident to the debts secured. In choosing to claim under the formal mortgage he perforce disclaims claiming under the
69 equitable,—hence he alleges, and obtains judgment, that the agreement and all rights thereunder, have ceased and determined. He squarely plants himself upon the propositions that, (1) the formal mortgages are in full force; (2) that the equitable mortgage is of no force. If defeated in his attempt to secure the relief demand-, then in order to claim the other, he must reverse his position, and assert that the "dead" mortgage is in full force and effect, and that the others are extinguished. Had he attempted such a shift in pleading it would have been a departure.

Jones *vs.* City of St. Paul, (Minn.) 75 N. W. 5.

II.

The fact that the equitable mortgage was not made a personal claim against appellants in no manner changes its character as a mortgage.

Fisk *vs.* Stewart, 24 Minn., 97.

In their brief, (p. 11 fo. 20) counsel say this mortgage is uninforcible, save possibly for the interest,—that the only possible foreclosure of it is by way of a foreclosure of the formal mortgages. The consistency of this with their demand, here first made, for a foreclosure of the equitable mortgage simply, is not easily discoverable. But the point of interest is that no *raison d'etre* is suggested for the assumption that the later mortgage can only, or can at all, be foreclosed for a sum other than that secured by it. Nor for the analogous position that such mortgage does not at all secure the amount specified in it, but is merely collateral security for such wholly different amounts. Here again it is not primarily a question as to liens, but as to amounts. We are also left in darkness as to the *modus operandi* by which the monthly payments of interest (6 per cent. per
70 annum upon the principal sum, $20,400) are to be considered to be not at all payments of interest upon that sum but as, *ex gratia* only, payments *pro tanto* upon the interest upon the formal mortgages. It must follow that any payments upon the principal sum ($20,400), if made, could only be applied as payments in like manner upon the former mortgages. Is it possible that counsel have developed from their idea that the equitable mortgage was forfeited, the conception that appellants never had any rights thereunder unless it be to pay the sums specified, together with enough more to satisfy the old mortgages with all interest at the old rates?

III.

Counsel also now argue from their assumption that their client made a bad bargain, that he should not be presumed to have intended the necessary results of his contract—but rather, in deference to such assumption, the provision of the contract fixing the $20,400 as the total debt should be construed to mean something else. But they also say, that their client intended, and supposed the contract to effectuate that intent, that upon any default in paying the monthly interest, all appellant's rights in the land instantly terminated, and that he became *ipso facto*; the owner and entitled to instant possession of all the lands. But they fail to indicate any possible interest to him, under such understanding, to retain the lien of the old mortgages, nor any legal claim to the amount thereof—unless indeed, as logically follows from the position of counsel, he intended and supposed he retained such right of ownership and possession, and also the personal demands against appellants of the tens of thousands of dollars called for by such securities in addition.

71 It need not be forgotten that, while counsel in their complaint, allege the total value of this land to be less than the amount due by the terms of the contract, they yet refused judgment

for that sum, and now insist upon the payment of upwards of $27,000 in redemption.

IV.

The attempt of counsel in their brief to assert any absence of good faith in one of the appellants, either in procuring the contract, or otherwise, being as devoid of foundation in the record as it is in defiance of the facts, would appear to be but another exhibition of facility in invention. The case shows affirmatively, that in entire satisfaction with the contract as it is, respondent, through his present leading attorneys, brought suit in ejectment upon it—then without suggestion of mistake or variance from his intention in any portion of the transaction, brought the present action.

V.

The seeming antipathy between counsel and the facts is again illustrated in their charge that appellants have changed front on this appeal.

In their answer, at the trial, and in their motion for amended findings their position was unmistakable, viz.: That the total debt was the agreed $20,400, and that the old mortgages were superceded by the equitable mortgage. Such is still their contention. In explanation of the fact that the mortgages were not satisfied of record, the further fact that they might prove of value as against adverse claims or mechanics' liens was stated in my former brief to this court. Also, as showing the logical sequence of respondent's claims, the fact that respondent held in his hands the difference between the agreed sum due on the old mortgages and the
72 $20,400 during the time intervening the making of the equitable mortgage and the assignment to him of the Willis mortgage, some five months. That this money either was the money of respondent or of appellants. If the latter, then *ex necessitate* respondent held it as trustee for appellants, to be used in buying in the outstanding mortgage. But under neither the complaint nor the evidence could plaintiff recover upon this ground. If the former, then it must be so by reason of his agreement to buy in that mortgage. Even if, upon buying that in, it was the understanding that it should be considered to be held as collateral to the equitable mortgage, then of necessity the latter was the principal, and the other mortgages collateral security only for the amount secured by that. The only answer to this argument is the assertion of a change of position, aided by that of their new and "surprising claim" of a new loan of the $20,400.

VI.

As to the three evidences of an intention that respondent should retain the former mortgage liens specified in his brief (p. 7 fo. 19) these considerations should not be overlooked.

(1.) The contract reads, (fo. 24), "In consideration that said "second party has taken and herewith does pay and take assignment to himself, etc.," of the outstanding mortgages. That is, as between the parties to this agreement, the mortgages are "paid."

(2.) Asserted "recognition of the mortgages as subsisting liens, in the deed." The only reference is the following: "That the same "are free from all incumbrances except those now of record thereon." This is no recoguition that such liens are existent or of force.

O'Brien *vs.* Findenan, 48 Minn., 213.

73 (3.) That plaintiff continued to hold them. Being kept unsatisfied as a protection against possible adverse claims, as matter of course he would hold them.

VII.

The drowning of a lien in a title in fee, is but one meaning of the word "merger." Appellants never suggested this sort of merger in this case. It as well signifies the extinguishment of a prior lien by the taking of a later one in substitution.

See, 15 Am. & Eng. Enc. Law, p. 331.

Yet many of respondent's cited authorities are cases only of the former class. In most of those remaining the action was between a stranger to the contract or later security and the mortgages therein or to the point, only that the mere taking of a later security for the *same debt* does not merge the former lien.

VIII.

Noting the omission in my former brief of support to the 9th assignment of error, briefly this—The finding and order complained of will result in a sort of strict foreclosure of the equitable mortgage in so far only as it gives a lien upon the land not included in the other mortgages. This is error for—

(1.) It is contrary to the theory of the complaint and action as tried.

(2.) The court found, and the judgment declared the contract, the soul of that mortgage was without life.

(3.) Judgment of sale of all the other lands was ordered, and such sale was immediately made, and those lands were bid in by respondent for the full sum found due with all costs. It has long been settled that such sale satisfies and pays the mortgage debt.

74 There can be, therefore, no debt left in existence to be satisfied by such passing of title under the ordered strict foreclosure. Now this judgment contemplated and made possible this result—also a purchase by others than the respondent. Had the lands been bid in by others, such sale alone would have satisfied the entire debt, yet respondent would have become the owner of this extra land upon failure to redeem from such sale—hence would have been twice paid his demand, just as he now will be upon such failure. This error is found in the findings and order of the trial court, hence no motion to that court to correct it was necessary. Such motion, however, was made and denied. See fo's 152 and 162 to 164, P. B.

IX.

In their brief, (p. 8), counsel say that the agreement—"recognizes the continued existence of the old" mortgages. But it is to be

noted that the agreement fixes the "principal sum," (fo. 28, P. B.) thereby secured as $20,400 and no more. Also that the deed, then delivered in escrow, and to be delivered to appellants upon their payment of the $20,400, was the agreed satisfaction piece of the new mortgage, and at the same time would formally satisfy of record the old. Now by its terms, the payment of this new "principal sum" and the equitable mortgage securing it, were "In consideration of "certain indebtedness" held by respondent, "secured by mortgages "on the land, and in consideration that he has taken and herewith "does pay and take assignments" of the remaining mortgages and in consideration of the delivery in escrow of the deed of defeasance. Thus this "recognition" of the old securities is in immediate context with, or rather is a part of, the provision merging them in
75 the new. The parties "recognized" this fact, also the contradiction between the total amount due by the terms of the old, and the agreed principal of the new security. They also recognized the impossibility of so construeing the agreement as to make the new mortgage collateral to those then held by strangers to it.

X.

By the delivery in escrow of this deed it was put beyond the power of respondent to refuse formal satisfaction of all the mortgages upon the records, upon payment of the $20,400 with interest. Right here, however, should be noted the distinction between the effect of such payment upon the new, and upon the old securities. It is a condition precident to the actual satisfaction, only of the equitable mortgage. While the incidental, yet necessary, effect of the second delivery of the escrow deed is a formal record satisfaction of the old, this fact in nowise tends to disprove their merger in the new, security.

XI.

The fact that the new agreement and security were taken in lieu of the old liens, (and that it was not the understanding that payment of the new sums was to be considered as a satisfaction) is shown by the following, among other considerations:

(1.) A six per cent. annuity was created, terminable only at the option of appellants. The time is extended beyond the statutory life of the old liens.

(2.) The new agreement, in all its parts, is operative *in presenti*.

(3.) Everything was settled and concluded. Respondent
76 did not contract to satisfy the old liens on payment of the $20,400. The only satisfaction provided as to them is wholly incidental, and none whatever in case the annuity be paid throughout their life. Save getting in the liens outstanding, nothing remained to be done by respondent, and nothing but payment of the new sums, by appellants.

(4.) Once a mortgage, always a mortgage. The exclusive character of the new arrangement and security in: (*a*), amount, (*b*), rate, and (*c*), times of payment of interest, (*d*), maturity of principal, (*e*), consequences of default, (*f*), method of satisfaction, (*g*), absence of

personal liability, and (*h*), in the payment in advance for getting in the outstanding liens.

XII.

Counsel argue that it is inequitable to deprive respondent of his securities. Under their claim that he understood that he became the owner in fee upon any default, it is not apparent how he could lose any securities in taking such title. His mistake, if any, is purely of law, and he seeks no relief, but sues, taking the contract as it is. As to the justice of this claim:—He says, through counsel, that he understood he was either to get the $20,400 or the land. Yet he refused appellants' offer at the trial to give him precisely this relief, demanding either the land or some $27,000—more than $4,000 over what he says he understood he was to have. Whatever his understanding he well knew he must lose all his securities upon payment of the $20,400 with interest. Also, that if appellants defaulted, he still had a first lien under his equitable mortgage for that sum, upon all the lands in the old mortgages, with the new tract
77 in addition. Had he been content to receive his just dues, he would have sought foreclosure of his equitable mortgage only. His loss, consequent upon a reversal of the judgment, is but failure to sustain the recovery of the extra thousands of dollars, to which he shows no right, legal, equitable or moral. It is this, and not any loss of securities he strives to avoid. The results, consequent upon treating the old mortgages as still in life, being thus wholly inequitable, they must be held to have been extinguished.

See cases cited, p. 17 of main brief, and 15 Am. & Eng. Enc. Law, p. — note.

Respectfully submitted,

J. A. SAWYER,
Att'y for Appellants.

78 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1898.

DANIEL S. PIPER, Respondent,
vs.
JOSEPH A. SAWYER ET AL., Appellants.
} Petition for Modification of Order or for Rehearing in Part.

The appellants respectively petition this court that it so modify its order as to omit its holding that no obstacle to a foreclosure of the equitable mortgage exists, and its direction to find the amount due thereon and enter judgment of foreclosure for such sum, or in lieu thereof, that a rehearing upon that point be directed herein.

It is respectfully submitted that the matters passed upon in this portion of the order have never been passed upon by the trial court, nor argued and submitted to this court.

It was argued that the complaint is not broad enough to warrant such relief in this action, and possibly also a claim that on appeal respondent could not so shift his position. I think there are other considerations to be passed upon before any order of foreclosure be

entered, which the record affirmatively shows have not been passed upon below, and hence not to be decided here.

Woodbridge *vs.* Sellwood, 67 Minn. N. W. R. 788.
Coombs *vs.* McDonald, 43 Neb. 652, 62 N. W. R. 41.
Maxwell *vs.* Graves, 59 Ia., 613, 13 N. W. R. 758.
Bartemyer *vs.* Iova, 18 Wall. 121–125.

Indeed plaintiff's express refusal, at the opening of the trial below, to accept such foreclosure and his insistence upon his claims under all the old mortgages prevented the raising of that question there. Yet defendants might, as they did, then offer him such relief without waiver of any rights upon his refusal.

79 Or, if it be that the court intended to pass upon such point, then that it was mistaken in its assumption that the complaint prayed alternatively, "that the contract itself be foreclosed, etc. to satisfy the amount due thereon." (Opinion 3rd page near top.) And also that it was not intended to present the matter now submitted, nor was this matter argued save as above.

The prayer for relief is, first, for a strict foreclosure of all the mortgages for the sum stated to be due upon the four formal mortgages, with the attorneys' fees therein stated and costs, second, as follows,—"Or in case the court shall deem it inequitable to adjudge a strict foreclosure thereof as above prayed for, then that said contract and all said mortgages be foreclosed to satisfy the amount so adjudged to be due thereon" (viz. the amount due on all the other mortgages with the several attorneys' fees) "together with costs of suit, stipulated attorneys' fees, etc." See Paper Book p. 13 to 37. No foreclosure of the contract alone nor of the equitable mortgage alone, nor any foreclosure for the amount due thereon is prayed for.

In order further to exhibit some of the matters appearing here to be relevant, the clerk of the trial court certifies herewith copies of the original complaint, findings and order, motion by plaintiff to amend both complaint and findings, proposed amended complaint, final findings and order and judgment in the former action between the same parties referred to in the answer and reply herein. Also of the sheriff's report of sale and order of confirmation thereof, with register of deeds certificate that the sheriff's certificate of sale was duly recorded; all being of proceedings in the present action. The above proceedings in the prior case show—(both the complaint and proposed amended complaint are personally verified by the plaintiff), that he averred himself to be the owner, under the deed, of all the lands and as such sued in ejectment for possession with damages for withholding. That on trial the court held no transfer of

80 title, but an equitable mortgage had been made. That thereupon plaintiff moved to amend his complaint to conform to such finding, and that the findings and order be so changed as shown in said certified copy, and for foreclosure of such mortgage. But the trial court ordered the action dismissed "without prejudice to plaintiff's right of action to foreclose his equitable mortgage," and plaintiff had judgment entered accordingly, without prejudice as above. The certificate of sale and order of confirmation show

that plaintiff immediately upon entry of judgment herein proceeded to sell the lands thereunder and had such sale made of record in the register's office. It is my view that under such circumstances, even if plaintiff did not by bringing action to foreclose the former mortgages, elect to rely upon them only and waive all claims under the equitable mortgage, he at least did so elect when he refused to accept that relief upon its being offered to him on the trial. That the two rights and remedies were antagonistic, or rather were alternative and not co-ordinate, and that upon defendant's offer of judgment in the action chosen, such action, under that offer was not a mere seeking of an impossible remedy since thereunder he might have obtained all the relief he was entitled to. That he could not refuse such relief, compel the court and the defendants to litigate the case to final issue on appeal, and then being defeated in his demands for the extra sums, turn around and re-elect to take that remedy he had expressly refused at the outset.

I.

He had full knowledge both as to the facts and the law. The court in the former action had held the transaction to be an equitable mortgage and entered judgment upon such holding. This was *res adjudicata.*

II.

The two positions were antagonistic. He could only recover on the mortgages sued upon the theory (expressly set up in
81 his complaint, followed throughout the trial and embodied in the judgment) that by the default the contract became null and void, leaving those mortgages in full force. While to recover on the equitable mortgage either in this or in any other action he must stand upon the ground that the mortgages sued on were void, and that only in force.

7 Enc. Pl. & Pr. p. 362–363 and note 1 p. 363.
Thompson *v.* Howard, 31 Mich. 311.

In the latter case it is said—"It is well settled that a man may not take contradictory positions, and where he has a right to choose one or two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one with knowledge of such facts as would authorize a resort to each will preclude him from thereafter going back and electing again." This is often cited and followed in later cases. See Black *v.* Miller, 42 N. W. R. 838, bot., 839 top.

In 2 Black Judgments, sec. 632, it is said that "The rule forbids a party to assume successive positions, in the course of a suit or series of suits, in reference to the same facts or series of facts, which are inconsistent—or mutually contradictory."

Inconsistency in the underlying positions is everywhere recognized as the test.

III.

This is not a case of seeking for an impossible remedy—for at least two reasons.

First. At least when the offer of judgment was made and upon that offer plaintiff again elected not to accept it, such offer itself made the remedy chosen at the outset issuable in full relief to him. It matters not that by his then act he failed to recover any relief.

Field *v.* Burton, 49 Mich. 53, 12 N. W. R. 906.
Thomas *v.* Watt. Mich. 62 N. W. 345.
Cooper *v.* Smith, Mich. 67 N. W. 516.

82 In Thomas *v.* Watt *supra* the former action was dismissed for failure to file security for costs, and in the Cooper case plaintiff voluntarily dismissed it. No relief was obtained in either case—yet held an election. To the same precise effect are many of the cases hereinafter cited.

In the Nield case the first suit was in a court not having jurisdiction. Yet the election was held final, and this case has been often followed in that and other courts. The reason for this holding is that the election was made, and the fail——

Second. With full knowledge of all the facts and also of the law lying at the foundation of his rights, that having been before adjudicated, by his election to press his claims as he did, he elected his course and must abide the result.

In Sullivan *v.* Ross's Estate, Mich. 71 N. W. R. the plaintiff had had two trials below, in the second of which he knew all the facts yet insisted upon his course and secured judgment there which was reversed on appeal—the supreme court holding that there was not the slightest foundation for such claim and judgment. The action was upon a contract which plaintiff asserted constituted an agreement of sale of certain logs to defendant Ross. Upon the remand plaintiff moved the trial court to amend his complaint to show that Ross, under that contract became a quasi trustee of the logs and in the execution of such trust did not use due care and had thereby lost a portion of the logs etc. whereby plaintiff suffered damage. He claimed on appeal from an order denying such motion that his former quest was a mere seeking after a mistaken and impossible remedy. The order was affirmed. The court says—p. 635—

"With full knowledge of all the facts, he deliberately chose his remedy, and put the estate to a large expense in his attempt to sustain his claim. It is not a case of a mistake in the remedy, but a deliberate choice in remedies. The law does not permit
83 litigants thus to play fast and loose—but leaves them to lie upon beds of their own making."

In National Bank of Ill. *v.* Bank of Emporia, 51 Kan., 111—45 P. R. 79, the firm of L. & G. which owed both banks, made a chattel mortgage to L. as trustee to secure both debts, the amount of each being therein stated. The Ill. bank brought suit upon their claim and attached the property so mortgaged—other creditors having done the same. The property was sold and the proceeds applied on the several attachment judgments. Meantime the Emporia bank

brought suit to foreclose the mortgage. The trial court held the mortgage void and gave judgment to the Ill. bank. On appeal this was reversed and the mortgage sustained. On remand the Ill. bank moved the trial court to hold the mortgage a trust for both banks, and that the proceeds be applied *pro rata*, to both, therein accepting the same with all its provisions and paying into court the excess of moneys received over its *pro rata* share, etc. This motion was denied and all the defendants ordered to repay all moneys received into court for the benefit of the Emporia bank. On appeal this order was affirmed. After quoting from Thompson *v.* Howard 31 Mich. *supra* the court says:—

"In this case the Ill. bank had the option of accepting the security of the mortgage or rejecting it. In the latter case it might bring suit and attachment against the mortgage as fraudulent and void as to creditors. It chose that course, and—has litigated against the Emporia bank to defeat the claim of the latter under the mortgage and to obtain the entire proceeds. The mortgage was not only repudiated but made the basis for the attachment. The remedies were therefore inconsistent, and the plaintiff having taken and so long pursued its remedy by attachment must be content with the result." Again—

"The plaintiff in error claims that a party who imagines
84 he has two or more remedies, or who misconceives his rights, is not to be deprived of all remedy because he first tries the wrong one, and cases are cited in support of that proposition. But we think it has no application to a case like this." Citing *Re* Van Norman 41 Minn. 494, the court thinks this case distinguishable. To the same effect here as the above Kansas case is Lienkauff *v.* Forcheimer, (Ala.) 6 Southern R. 149. Also in principle Dyckman *v.* Sevatson, 39 Minn. 132 and the many other cases to the same effect some of which are later referred to herein, support the above cases.

The distinction between an election of mere remedies and one between alternative rights with their respective remedies has often been made and I think that distinction applied here reconciles most if not all the cases. It is that where a party possess a single right, and mistakes his remedy upon such right, he does not waive the right, by such mistake. But where out of certain facts known to the party, other rights may arise, calling for inconsistent remedies, and the party elects to claim one of those rights (and follows such election to final judgment) he thereby elects his position and waives the other remedies upon the right which he thus declined to claim.

(While there is a divergence in the cases as to whether or not such mere election binds the party, or whether he may, before trial, dismiss and assert such alternative right, I find all the cases in harmony to the point that where he pursued such chosen right to final judgment—and it matters not whether such judgment be in support or denial of such right—this constitutes an election and a waiver of the other alternative rights. See Jones *v.* Burgess (Ala.) 19 So. R. 851–856 and Bolton Mines Co. *v.* Stock 82 Md. 50–59 At. R. 491.)

The many cases holding that where one has a lien under a mortgage or other instrument, yet sues the owner either upon the debt so

secured or another debt and levies upon the property mort-
85 gaged, thereby waives his mortgage lien, lend support to the position here taken.

"One entitled to a benefit under an instrument, whether it be a will or any contract, if he claims the benefit of such instrument must abandon every right the assertion whereof would defeat even partially the provisions of the instrument. A party cannot occupy inconsistent positions, but will be confined to his election." Hermann Estoppel (Md. 1886) p. 1177. Cited and approved in many of the following cases.

In Bauman *v.* Jaffray, (Tex.) 26 S. W. R. 200–202, goods were conveyed to a trustee to secure certain creditors. One of such creditors having levied an attachment on the same goods he was held to have waived the security under such conveyance. After citing the above from Hermann the court says, p. 262–263: "Had the attachment proceeding been prosecuted to a successful termination, it would have defeated the intention of the mortgagor as expressed in the instrument, to the extent of the property taken under attachment. * * * The bank elected to reject the mortgage when it sued out and levied the attachment, and it could not relieve itself from the effect of such election by its subsequent abandonment of the attachment proceedings and offer to accept under the mortgage." Citing many cases.

In O'Brien *v.* Glenn, 91 Tenn. 106–17 S. W. R. 1030 a stock of goods was assigned to a creditor to secure his and other debts. The assignee attached the goods under claim that the assignment was void. He afterwards dismissed this suit and proceeded to act under the assignment. Held, that by such attachment he renounced the benefit of the assignment and could not thereafter claim under it.

After citing the above from Hermann, reverting to the claim by the assignee that since the attachment was filed under the mistaken view of the law by his attorney, (which was the fact) the court says, 17 S. W. R. p. 1031:

"This can make no difference. The Leas were acquainted
86 with all the facts in the case, and that they were wrongfully advised cannot, of itself, destroy or render nugatory their renunciation of the benefit under the assignment."

In Lawrence *v.* McKenzie (Ia.) 55 N. W. R. 507, one defendant had assigned certain book accounts to the plaintiff as security, but by understanding retained the book to collect for plaintiff such accounts. Later plaintiff sued out garnishment against the parties owing such accounts. Held he thereby waived his claim under the assignment. So to-, by analogy. Where the plaintiff attached certain property in an action to recover its purchase price, and the defendant claimed it as exempt, it was held that by the attachment the plaintiff waived his claim of title under the contract of sale which provided that he held the title until the purchase price was paid. Kolsky *v.* Loveman (Ala.) 12 So. R. 720.

So in Ward *v.* Green, (sup. ct. Tex.) 30 S. W. R. a purchaser of lands assumed in his deed a portion of a mortgage debt on the land—and the mortgagee thereafter brought suit against the mortgagors

and him to foreclose the mortgage, but did not therein seek any personal recovery as against the purchaser. Upon sale, there was a deficiency, and judgment therefor was entered against the mortgagors. This was invalid for want of personal service, they being non-residents. Thereafter suit against the purchaser to recover the portion assumed by him. Held not maintainable. The plaintiff had elected to waive this right, in bringing the former action. The court says, p. 866 30 S. W. R.

"Where a party who has a choice of remedies upon a cause of action pursues one of them to final judgment, he thereby makes an election by which he must be held to be estopped, and he cannot have successive suits against the same parties in order to determine whether or not he might recover upon a phase of the case not presented in the first action."

IV.

87 Not only is there here shown an election and waiver, but there seems ground for an estoppel. Knowing all the facts as well as the law, the plaintiff refused to accept the offer of full and complete relief and insisted upon carrying his contention to recover some thousands of dollars more than he had any shadow of claim for to judgment, and a sale of the lands therefor, putting on record his apparently valid certificate of sale, and requiring of the defendants the procuring of a bond in appeal, the appeal itself, and the removal of record of his false certificate of conveyance—he cannot now retrace his steps and demand the relief he has refused to accept.

Mosher *v.* Joyce, 51 Fed. R. 441, (before Brown justice and Jackson and Tafft C. C. J.) Action to recover for infringement of patent. Plaintiff's patent covered part only of the improvements contained in the articles made. He went to trial on a claim that the entire value of the profits on such articles arose from his invention and recovered in the trial court upon such claim. On appeal, it was held that his invention operated only partially in securing such profits, and that he should have known what part thereof so arose. On remand, he sought to amend and show such amount. Denied, and on appeal this was affirmed. "Held that it was a proper exercise of discretion to refuse the motion, as complainant, with full notice of defendant's claims, had chosen to rely entirely upon his own theory of the case."

In Black *v.* Miller (Mich.) 42 N. W. at p. 839 that court says—

"He made his choice of remedies, and while it is true that one may not be entirely inconsistent with the other, yet the policy of the law is to estop parties from pursuing some other mode of redress, after having elected their remedy that there may be an end of litigation."

I think it proper for me to state, in presenting this motion, that I greatly prefer not to present or press this matter. But since the portion of the order here objected to will in all probability prevent

88 any just settlement of the matter between the parties unless at very great sacrifice, and since I feel confident that if that be stricken out and the matter left for future consideration

such settlement will be readily made, whereby each party will receive his moral dues and there will remain no occasion for any further consideration by the court, I have decided to present the matter.

All of which is respectfully submitted

J. A. SAWYER.

89 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1898.

DANIEL S. PIPER, Respondent,
vs.
JOSEPH A. SAWYER and NELLIE A. Sawyer, Appellants. } No. 191. Copy of Order.

It is ordered that the within application for a rehearing be and the same is hereby denied and the stay of proceedings entered herein vacated.

Dated July 27, 1898.

CHARLES M. START,
Chief Justice.

90 [Endorsed:] State of Minnesota, supreme court.

91 STATE OF MINNESOTA, } *ss:*
County of Steele, }

District Court, Fifth Judicial District.

DANIEL S. PIPER, Plaintiff,
vs.
JOSEPH A. SAWYER, NELLIE A. SAWYER, and L. C. WOODMAN, Defendants.

Case as Settled by the Court Supplementary to the Former Settled Case.

After the decision of the supreme court on the appeal heretofore taken in this action and after the mandate remitting it to this court had been duly filed therein, the following proceedings were had in this court:

Notice and Motion for Leave to Serve and File a Supplementary Answer.

Made and served Nov. 18th, 1898.

92 Venue and title as above.

Please take notice—that the above-named defendants will present to said court at the court-house in the city of Faribault, Minnesota, at 9.30 a. m., on the 28th day of November, 1898, or as soon thereafter as counsel can be heard, the following motion for leave to serve and file a supplementary answer in said cause, a copy of which said motion and of said proposed supplementary answer is herewith

served upon you. Said motion is based upon the following grounds, viz:

The defense therein set forth is one originating since the former trial of this cause in this court, and dates in its fullness only from the entry of the judgment in said cause on appeal in the supreme court of Minnesota, and could not have been pleaded nor set forth save only at a time subsequent to the entry of said judgment on appeal, and subsequent to the remand of said cause to this court. Said motion will be made upon the files and papers therein named and also upon the original objections and proposed supplementary answer served upon you at the hearing of your motion for amended findings herein, and also upon the judgment on appeal in said cause.

Dated at Owatonna, Minnesota, this 18th day of November, A. D., 1898.

J. A. SAWYER,
Att'y for said Defendants.

To Daniel S. Piper, said plaintiff, and to Messrs. Wheelock & Sperry and Robert Taylor, Esq., his attorneys.

Motion.

Venue and title as above.

Defendants Joseph A. Sawyer and Nellie A. Sawyer above
93 named, hereby move the court for leave to serve and file their supplementary answer in said cause, a copy whereof is hereto attached. Said motion is based upon the pleadings and all the files in said cause and upon the judgment of the supreme court on appeal herein and upon the affidavit hereto attached and upon the court reporter transcript of the proceedings had at the former trial hereof in this court and upon the offer made by Joseph A. Sawyer as attorney for said defendants therein stated, and upon the refusal by plaintiff to accept said offer.

JOSEPH A. SAWYER,
Defendants' Attorney.

Affidavit Referred to in Above Motion.

Venue and title as above.

STATE OF MINNESOTA, } ss:
County of Steele, }

Joseph A. Sawyer being duly sworn, says that he is the attorney of the answering defendants herein and has been their sole attorney from the commencement of this action. That after the remand of this case from the supreme court of the State of Minnesota was filed herein, and the judgment of the supreme court was filed herein, said plaintiff, on or about the 1st day of September, 1898, served a notice upon this affiant of a motion herein for amended findings of fact and new findings of law, to be made by

the court herein on such motion; said motion to be heard, argued and submitted at the court-house in the village of Mantorville, Dodge county, Minnesota, on the 3rd day of October, 1898, at eleven o'clock of said day. This affiant was on said 3rd day of October; and for a long time prior thereto, confined to his
94 bed by sickness, and unable to attend to said motion at said time. Whereupon this court continued said motion to October 8th, 1898, at which this affiant as such attorney served upon the attorneys for the plaintiff a supplementary answer and affidavit and objections to the hearing of such motion and objections to the granting thereof, said objections specifically set forth the claims under the provisions of the United States Constitution as set forth in the proposed supplementary answer hereto annexed. That said hearing was thereupon by this court continued to October 14th, 1898, at Owatonna, Minnesota, at which time said plaintiff withdrew his said motion and all thereof and returned to affiant said supplementary answer and said objections. No proceedings of any kind in said cause have been had or taken since the decision thereof on appeal, other than as above stated. This affiant, by reason of ill health, has for many months and from a time prior to the decision by the supreme court of said cause on appeal, been unable to be in his office and unable to perform legal work save a little at a time and at intervals, and has been for quite a portion of the time confined to his bed, and a large portion of the time to his room; and since the withdrawal of said motion by plaintiff on said 14th day of October, 1898, affiant has remained ill and indisposed and unable to be in his office from sickness, and unable to perform professional labors, except only at intervals, and at such intervals only for a short time. He has on three separate occasions, since the 14th day of October, 1898, sought to draw and complete a supplementary answer, and motion for filing thereof, with the affidavits in support of such motion, and on each of said occasions has been, by reason of ill health and sick-
95 ness, compelled to desist therefrom, and unable to perform and complete said labor. No notice of trial or other notice of any proceedings in said cause has been served upon affiant nor upon either of said defendants, save as hereinbefore expressly stated. And affiant further says that by reason of sickness, he has been unable heretofore to complete said supplementary answer, motion and affidavits, or any of them. This affidavit is made for use in support of defendants' motion for leave to serve and file their supplementary answer herein.

At the commencement of the former trial of this cause in this court, and when the same came on for trial, in open court and before any of the proceedings relating to said trial had been taken or completed, this affiant offered in open court that the plaintiff take judgment herein foreclosing the lien of his equitable mortgage arising by virtue of the contract set forth in the complaint herein and of the deed from said defendants to this plaintiff of all said premises. Thereupon this plaintiff refused to accept said offer and refused to take said judgment or any judgment, other than one fore-

closing each of the former mortgages set forth in his complaint herein; that thereafter, and before the submission of the cause to this court for decision this affiant withdrew said offer.

Each of said defendants is a citizen of the United States.

Affiant further says that he has knowledge of all the facts touching the matter set forth in the supplementary answer herein and touching all issues therein sought to be raised; that upon said facts and upon the laws relative thereto affiant verily believes that
96 he has a good and sufficient defense in said action to the attempted foreclosure by plaintiff of his said equitable mortgage, and that he has a good and sufficient defense to all demands and claims in said action on the part of the plaintiff.

JOSEPH A. SAWYER.

Subscribed and sworn to before me this 15th day of November, 1898.

[NOTARIAL SEAL.] GEO. A. NEWSALT,
Notary Public, Steele County, Minnesota.

Proposed Supplementary Answer.

Venue and title as above.

I.

That at the beginning of the former trial of this action in this court, and immediately after the same was brought on before the court for trial, and before any proceedings had been had at such trial other than as above, said defendants in open court, offered to this plaintiff that he might take, without contest, a judgment and decree foreclosing the lien of his equitable mortgage herein and for the amount due and unpaid on such equitable mortgage; that said offer was then, and in open court declined, by the plaintiff, and such relief refused by him. That thereafter, and before said cause was submitted to this court for decision, said defendants withdraw said offer.

II.

That the former action set forth in the original answer and reply herein, and wherein this plaintiff was plaintiff and these defendants were defendants, was an action in ejectment, in which the plaintiff alleged himself to be the owner of all the lands described in the complaint herein, and entitled to the immediate possession of all thereof, and in which he demanded, as relief, that the de-
97 fendants surrender possession to him, and that he have certain moneys as damage for the withholding of possession thereof; that at the trial of said action in this court, it was by this court adjudged and decreed that said contract and decree set forth in the complaint herein, and which were both set forth in the complaint in said former action, constituted an equitable mortgage in favor of the plaintiff, securing to him the payment of the twenty thousand four hundred dollars with interest; and thereafter it was

further ordered and decreed by this court that said action of ejectment be dismissed. Thereafter, without notice to the defendants or either of them, the plaintiff caused a judgment of dismissal to be entered in this court. These defendants aver that they had no notice or knowledge of the entry of said judgment until the time of the service of the reply herein.

III.

Further answering, the defendants allege that this plaintiff has waived the lien of said equitable mortgage and precluded himself from attempting to enforce said lien and from seeking any foreclosure thereof.

IV.

Said defendants allege, and hereby claim the protection guaranteed to all citizens of the United States by the provisions of section ten of article one of the Constitution of the United States, and of section one of the fourteenth amendment to the Constitution of the United States; and further claim that any judgment herein in plaintiff's favor, foreclosing said lien for any sum whatever would abridge the privileges and immunities of these defendants who are citizens of the United States, and would deprive them of property
98 without due process of law, and would deny to them the equal protection of the laws.

Wherefore they pray that this action be dismissed on the merits and with costs.

J. A. SAWYER,
Defendants' Attorney.

Duly verified Nov. 15th, 1898.

Upon the hearing of defendants' said motion for leave to serve supplemental answer the plaintiff filed the following affidavit:

Venue and title as above.

STATE OF MINNESOTA, } ss:
County of Steele, }

W. A. Sperry and Robert Taylor being duly sworn on oath say they are attorneys for plaintiff in the above-entitled action; that they have read the affidavit of Joseph A. Sawyer of the 15th day of November A. D. 1898. That the statement in said affidavit that a supplemental answer was served upon plaintiff's attorneys is untrue; that notice of a motion for an amendment to the findings of the court in accordance with the decision of the supreme court, was served upon defendants' attorney, returnable on the 3rd day of October, 1898, at the village of Mantorville in Dodge county, said State, which was by consent of the parties continued until the 8th day of October, 1898, and was again continued to be heard at the clerk's office in the city of Owatonna, in said Steele county on the 14th day of October, 1898; that the defendants' attorney did submit to plaintiff's attorneys for inspection only, in the presence of the

judge of this court, a proposed supplementary answer but the same was not served upon plaintiff's attorneys or either of them, nor any such service accepted by plaintiff's attorneys or
99 either of them; that defendants' attorney did object to the hearing of said motion upon the notice then given on certain grounds of irregularity among other things, whereupon, by suggestion of this court said motion was withdrawn with the distinct understanding before the court that it might be again renewed to be heard at the approaching term of this court in Steele county, and all the papers of the defendants' attorney therein were thereupon returned to him. Affiant further says that the matters of fact which are set up in the proposed supplementary answer now offered by defendants' attorney are set forth and fully appear in the settled case hereby on file in this court to which reference is hereby made, and constitute a part of the return to the supreme court upon the appeal heretofore taken here; and were by said supreme court fully considered and determined. And they deny that defendants did ever withdraw the offer of judgment made on the trial as alleged in defendants' affidavit and proposed supplementary answer, or otherwise.

ROBERT TAYLOR.
W. A. SPERRY.

Subscribed and sworn to before me this 23rd day of November, 1898.

LEWIS L. WHEELOCK,
Notary Public, Minn.

No other affidavits or files were submitted to the court or considered by — in deciding said motion save as herein included.

Thereupon the court made the following order denying defendants' said motion

Venue and title as above.

This action came before the court at the court-house in the
100 city of Faribault in Rice county in said district and State on the 20th day of November, 1898, at 1.30 p. m. upon the application of the defendants Joseph A. Sawyer and Nellie A. Sawyer for an order herein permitting them to file a supplementary answer proposed and attached to the moving affidavit. Harlan E. Leach, Esq., appearing on behalf of said defendants in support of said motion and Messrs. Wheelock & Sperry and Robert Taylor, Esq., appearing for plaintiff and filing affidavit in opposition thereto, and upon hearing and considering said matter and the arguments of counsel therein: It is herein ordered, that said application of said defendants be, and it is hereby denied.

Dated at Faribault, Minnesota, Nov. 28th, 1898.

THOMAS S. BUCKHAM,
District Judge.

To which said order, denying defendants' said motion, for leave to file said supplementary objection, defendants then and there

prayed and were allowed an exception, and did then and there duly except.

Plaintiff's Notice of Motion for Amended Findings and Order.

STATE OF MINNESOTA, } ss:
County of Steele, }

District Court, Fifth Judicial District.

DANIEL S. PIPER, Plaintiff,
against
JOSEPH A. SAWYER, NELLIE A. SAWYER, and L. C. WOODMAN, Defendants.

SIRS: Please take notice, that upon the mandate and remittitur, judgment, and decision of the supreme court, of said State in this action transcripts of which are on file herein in the office of
101 the clerk of this court, and copies of which are attached to the annexed affidavit of W. A. Sperry, and upon said affidavit, copies of each and all of which are herewith served upon you and upon all the pleadings, records and files herein, said plaintiff will make application to said court at the general term thereof to be held in and for said Steele county at the court-house in the city of Owatonna, in said county, on Tuesday the 6th day of December A. D., 1898, at the opening of said court on that day or as soon thereafter as counsel can be heard, to have the findings and decision of this court herein amended and modified in accordance with the said judgment and decision of said supreme court, and upon the grounds set forth in said judgment and decision of said supreme court and that said action will then and there be brought on for hearing, trial determination in accordance with the said decision direction and judgment of said supreme court herein a draft of such amendment and modification of the findings and decision of this court herein proposed by plaintiff and so to be applied for is hereto attached and herewith served upon you.

Dated this 22nd day of November, A. D., 1898.

WHEELOCK & SPERRY AND
ROBERT TAYLOR,
Attorneys for said Plaintiff.

To the above-named defendants, and to Joseph A. Sawyer, Esq., defendants' att'y.

Affidavit of W. A. Sperry, Attached to said Notice of Motion.

Venue and title as above.

102 STATE OF MINNESOTA, } ss:
County of Steele, }

W. A. Sperry being duly sworn says he is one of the attorneys for the plaintiff in the above-entitled action and says that the appeal to

the supreme court of said State from the judgment of this court heretofore entered herein has been duly determined and judgment therein, has been duly entered in and by said supreme court, and said cause has been duly remanded to this court and a transcript of the opinion, decision and judgment of said supreme court therein has been duly filed in the office of the clerk of this court, true copies of all of which are hereto attached and are hereby referred to and made a part of this affidavit and are served herewith.

W. A. SPERRY.

Subscribed and sworn to, etc.

Judgment in the Supreme Court.

Pursuant to an order of court duly made and entered in this cause on the 15th day of August, A. D. 1898. It is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to wit, of the district court of the fifth judicial district, sitting within and for the county of Steele, be, and the same hereby is in all things reversed, together with all subsequent proceedings in the direction of its enforcement, if any there be, and the court below directed to proceed in accordance with the views expressed in the opinion a copy of which opinion is attached to and made a part of the remittitur. And it is further determined and adjudged that the appellants above named to have and recover of said Daniel S. Piper, respondent, herein, the sum and amount
103 of one hundred twenty-six and ninety one-hundred- dollars, ($126.90) costs and disbursements in this cause in this court, and that said appellants have execution for the enforcement thereof.

Dated and signed this 15th day of August, 1898.

D. F. REESE, *Clerk.*

STATE OF MINNESOTA, *Supreme Court,* } ss:

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office, that I have carefully compared the within copy with said original and that the same is a true transcript therefrom.

[SEAL.]

Witness my hand and the seal of the supreme court at the capitol in the city of St. Paul, this fifteenth day of August, A. D. 1898.

D. F. REESE, *Clerk.*

Mandate.

STATE OF MINNESOTA, *Supreme Court,* } ss:

The State of Minnesota to the hon. judge and officers of the district court of the fifth judicial district, sitting within and for the county of Steele, Greeting:

Whereas, lately at your court, in an action therein pending, wherein Daniel S. Piper was plaintiff and Joseph A. Sawyer, Nellie A. Sawyer and L. C. Woodman, defendants, a certain judgment was entered therein on August 19th, 1897, from which judgment said defendants, Joseph A. Sawyer and Nellie A. Sawyer appealed to this court.

104 And whereas, the same was duly argued, heard and submitted at the general April term A. D. 1898, at our supreme court. After mature deliberation thereupon had our supreme court did adjudge, determine, decree and order "That the judgment of the court below herein appealed from, be, and the same herein is, in all things, set aside, and reversed, etc., as set out in the transcript of judgment and copy of opinion of this court hereto annexed and made a part of this remittitur:"

Now, therefore, this mandate is to you directed and certified to inform you of these proceedings had in our supreme court, in said hereinbefore mentioned cause, and the same is hereby and herewith remanded to your court for such other or further proceedings therein as may be by law necessary, just and proper, under and by virtue of the said order herein made.

Witness the Hon. Charles M. Start, chief justice of the supreme court aforesaid, and the seal of said court at St. Paul this fifteenth day of August, A. D. 1898.

D. F. REESE,
Clerk of the Supreme Court.

Syllabus.

1. A certain contract, entered into between plaintiff and defendants concerning certain real-estate mortgages upon lands owned by the latter, construed with reference to other facts and circumstances constituting a part of the same transaction. Held, that said contract, constituted an equitable mortgage upon the lands into which the prior mortgages had merged.
2. Held also, under the allegations of the complaint herein, and the findings of fact that plaintiff was entitled to a foreclosure of
105 the equitable mortgage in this action.

Opinion.

February 19th, 1895, defendants, husband and wife, were the owners in fee of a farm embracing 790 acres. Plaintiff held a mortgage upon all of this land, except ten acres upon which there was no incumbrance. There were three prior mortgages upon parts of this

farm, and two of these, both past due, has been assigned to the plaintiff by the mortgagees. The third, known as the Willis mortgage would not mature until July, 1895. On the day first mentioned, plaintiff of the first part and defendants of the second part and one Woodman of the third part, entered into a tripartite agreement, in which $20,400 was fixed as the total amount secured by the four mortgages before mentioned—although it seems to have been more—and it was agreed—first—that defendants should forthwith convey to plaintiff by deed, containing special warranty covenants, all of the lands encumbered and the ten acres unincumbered; that defendants should pay certain taxes on the lands; that they should keep the farm buildings insured for plaintiff's benefit and that, commencing on the last day of the month of February, they should, on the last day of each and every month thereafter and continuously, pay to plaintiff the sum of $100, no time being expressly fixed when said payments should cease. Second—Plaintiff was to procure an assignment of the Willis mortgage to himself, thus becoming the owner of all the mortgages; he was to execute a warranty deed in due form of law of all said lands, in which defendant's wife was to be named as grantee, and this deed was to be placed in the
106 hands of Mr. Woodman, to be held by him in escrow until defendants "shall have paid all said monthly payments" and also the sum of $20,400, the latter to be paid in sums of $50 at defendant's option. The contract further provided as follows, a part of which we italicise: "It being agreed and understood that said parties of the first part shall become entitled to the delivery to them or their assigns of said deed held by said party in escrow, as above at any time whatever, provided only that they continuously pay said $100 monthly and also pay said sum of $20,400 in time and manner as above and it is further provided that said monthly payments shall be diminished from and after any payment upon said $20,400 in the same proportion which the sum or sums paid thereon bear to said total sum of $20,400. *Provided further, that upon failure of said party of the first part to pay said monthly payments, all their rights hereunder shall cease and determine.*"

Defendants duly executed and delivered the deed to plaintiff and it was soon afterwards recorded. Plaintiff purchased and procured an assignment of the Willis mortgage, and also executed and placed a deed from himself to Mrs. Sawyer in Woodman's hands, as agreed on and the latter, in form, became a party to the contract. The defendants paid the monthly installments during the year 1895 and then defaulted. Nothing has been paid on the principal. The complaint in this action set up the execution, delivery and record of each of the mortgages, the assignment of the three, which in point of time preceded that in which plaintiff was mortgagee, and the recording of each assignment, the making of the contract
107 before referred to and the default of the defendants in its terms and conditions. Judgment was demanded to the effect that by reason of the default on defendants' part the original sums due upon the notes secured by the four mortgages be adjudged due, and a foreclosure of each mortgage be had for the respective sums due

with a sale of the mortgaged property to satisfy the debts. Or that the contract itself be foreclosed by sale of the premises therein described to satisfy the amount due thereon with attorneys' fees, costs and expenses. Further and other equitable relief was also demanded. At the opening of the trial of the issues made by the defendants' answer and plaintiff's reply, the former seem to have offered that judgment might be entered for a foreclosure of their rights in the contract, but the offer was declined and a trial had, the real contention being over the construction to be placed upon a part of the language of, the contract hereinbefore quoted. On findings of fact the court below ordered judgment for a foreclosure of each of the mortgages and all costs of the proceedings, the total amount for which judgment was ordered being several hundred dollars in excess of the amount due, if it be held that the four mortgages merged in the transaction of February 19, and that the contract of that date, became an equitable mortgage as between plaintiff and defendants, for the principal sum of $20,400, extinguishing the older mortgage securities then in plaintiff's hands and also that held by Willis when it got into his hands by assignment as agreed upon.

That it was competent for the parties to enter into a contract in the nature of an equitable mortgage which would be a substitute for, and would operate as an extinguishment of plaintiff's then existing rights under his past-due mortgages is not questioned, nor can it be doubted that he could enter into a valid contract of that same nature in reference to the acquisition and merger of the Willis mortgage. There was ample consideration for such a contract and when plaintiff stipulated that the amount for which he would release the lien should be $20,400—really less than the amount actually due—he either took the chances of that being sufficient to cover the amount due or for an ample consideration, found stated in the contract, relinquished the excess. The contract being valid and enforcible, the rights of the parties depend upon the construction to be placed on the words which we have italicised in the foregoing quotation and these are to be construed in the light of the surrounding circumstances, some of which are prominent and very influential. It is to be observed that, as a part of the transaction defendants conveyed to plaintiff all of the mortgaged premises and 10 acres of land on which there was no incumbrance, and that the defendants' right to pay $100 per month, which evidently was considered as payment of interest at a trifle less than six per cent. per annum, was unlimited as to time, that the option to pay this principal sum when defendants' choice was conferred upon them, should they otherwise comply with the terms of the contract and finally, that the only provision which expressly referred to a termination of defendants' rights was that which provided that in case of their failure to make the monthly payments "all their rights hereunder shall cease and determine."

The legal effect of these salient points in the contract, and of what was done in persuance of the same was to transfer the record title of the land to plaintiff, to give him additional security, to reduce the principal of the debt, a

part of which was not due, to $20,400, to indefinitely postpone and extend the time for the payment of the principal sum, if defendants made the monthly payments and to provide, not that the original indebtedness should remain and the original securities be enforced for the full amount due in case of a failure to pay $100 per month, but simply and solely that defendants' rights under the contract itself should end. In other words, that if they defaulted in their continuous payments of $100 their right to the postponement of the due day of the principal sum and to extend the time of its payment at their option and their other rights to pay the same in sums of not less than $50 each, ceased and determined. We are of the opinion that no other construction can be given to the language used when we consider the facts specially referred to and their legal effect. For instance, under the contract defendants could have postponed payment of the principal sums therein mentioned at their pleasure and could have prevented any action whatever therein until foreclosure of the mortgages became barred under the statute of limitations. But had this been done the indebtedness of $20,400, or any unpaid part of the same would have still remained unpaid and would have still been secured by an equitable mortgage on the land. This fact seems to conclusively establish the proposition that the contract has always been such a mortgage and in which the four prior encumbrances had merged. The court below was in error when it
110 held that those prior mortgages remained and were valid and subsisting liens on the lands therein described.

It is argued by defendants' counsel that in this action plaintiff is not entitled to a foreclosure of this equitable mortgage, the reason given being that he elected to institute this proceeding for a foreclosure of the original mortgages only, and expressly declined to accept the relief afforded by a foreclosure of that found in the contract. As before stated the complaint was broad enough to have justified findings upon which could have been predic-ted conclusions of law in accordance with the views herein expressed and ordering a foreclosure of the equitable mortgage for the sum due on the contract, with proper costs of the proceedings and the findings of fact actually made warrant such conclusions, except that the sum due was not ascertained. No good reason existed at the termination of the trial below, and none now exists why plaintiff should not be entitled to a foreclosure in this action of his equitable mortgage on the 790 acres. The judgment appealed from is reversed and set aside together with all subsequent proceedings in the direction of its enforcement if any there be. Upon the remanding of the cause to the court below it will proceed to determine the amount due upon the equitable mortgage, amend its findings of fact to correspond, and also amend its conclusions of law in accordance with the views herein expressed.

COLLINS, *J.*

On the first day of the regular December term of this court, to wit, on the 6th day of December, 1898, upon the hearing — plaintiff's said motion to have the findings of this court amended and modified

as directed by the decision and judgment of the supreme
111 court, before any other proceedings were had defendant read the affidavit of J. A. Sawyer, one of the defendants, and in connection therewith also offered in evidence that part of defendants' trial brief in the former action referred to in said affidavit, found on page six of said trial brief and included in said affidavit, together with the title of said case upon said brief, and the formal admission of service thereon of said brief by Wheelock & Sperry, attorneys for the plaintiff, which is hereto attached marked Exhibit 1.

To this the plaintiff objected on the ground that it was incompetent, irrelevant and immaterial and was inadmissable on the hearing of this motion. The court sustained the objection and defendants excepted to the ruling.

Thereupon defendants further offered in evidence the following papers, viz.: The complaint, answer, reply, findings and order for judgment, and judgment all of which were the pleadings, papers and records in the former action between the same parties and the same being parts of the judgment-rolls in said former case between the same parties, copies of which are hereto attached marked Exhibit 2, "Ex. 3," "Ex. 4," "Ex. 5," "Ex. 6," "Ex. 7" and "Ex. 8," and before making such offer of evidence, offered and asked leave to call as a witness George W. Peachey, clerk of this court, to prove by him that said complaint, answer, reply, findings and judgment were and are the complaint, answer, reply, findings and judgment in such former action, and constituted a part of the judgment-roll therein; thereupon the plaintiff's counsel objected to the calling of such witness and to the admission of said papers, and each thereof,
in evidence upon the same grounds last above specified,
112 which said objections, and each thereof, were sustained by the court; to which said orders and rulings of the court, and to each thereof, the said defendants then and there duly excepted.

Defendant- then offered in evidence the first notice of plaintiff to amend findings and also the objections thereto of defendants upon the same grounds, to which plaintiff objected, which objection was sustained by the court to each of said offers, and an exception to each of said rulings was duly taken by defendants.

Defendants then renewed their offer to file their supplementary answer in the above-entitled action, to which the plaintiff objected on the same grounds above specified and also on the grounds that the proposed supplementary answer did not set up facts constituting a defense and that the matters set forth in said proposed supplementary answer were *res adjudicata*, which said objection was sustained by the court, and exception duly taken by defendants.

Defendants then entered formal objection to the motion for an order amending findings and amending the judgment, both generally and specifically, upon the ground (*a*) that the court, by its order refusing to allow supplementary answer and in excluding the above evidence, has prevented defendants from all right to any trial and prevented them from introducing and proving their defense, which said objections were overruled by the court, and to

which said orders, and to each and all thereof, defendants duly excepted.

Affidavit of J. A. Sawyer, Referred to Above and Admitted and Filed.

Venue and title as above.

113 STATE OF MINNESOTA, } ss:
County of Steele, }

J. A. Sawyer, being duly sworn, says that he is one of the attorneys of the two answering defendants above named, and at all times he has been their attorney in said action, also in the former action between said parties referred to in the answer and reply herein. That upon the trial of said action in this court, prior to the appeal therein, the same being at the regular June, A. D. 1897, term of said court, after the evidence therein was taken it was agreed by and between the respective counsel and the court that the plaintiff's counsel should make and serve upon defendants' counsel (this affiant) their trial brief therein, and that thereafter affiant, as defendants' counsel, should make and serve upon plaintiff's counsel his trial brief in said cause and that thereafter said cause should be submitted to the court upon the evidence, arguments and said briefs. That thereafter plaintiff's counsel did serve upon affiant their trial brief, whereupon this affiant, acting as defendants' counsel as aforesaid, did serve upon plaintiff's counsel his trial brief, which said trial brief is hereto attached. That said cause was not submitted to the court for decision until after said briefs were so served. That in affiant's said trial brief and upon the sixth page thereof (both in said original brief, which was submitted to the court and in the copy thereof which was served upon plaintiff's counsel as aforesaid), is this matter:

"At the opening and before the trial began, defendants offered in
" open court that plaintiff might take, without contest, a decree for
" foreclosure of the equitable mortgage. This offer was
114 " expressly refused. It is now withdrawn. It was impliedly
" withdrawn upon its refusal."

Upon the back of said brief Messrs. Wheelock & Sperry, attorneys, then and now, of the plaintiff, admitted service on the 22d day of June, 1897, as appears thereon.

(Signed) J. A. SAWYER.

Subscribed and sworn to before me this 5th day of December, 1898.

HARLAN E. LEACH,
[NOTARIAL SEAL.] *Notary Public, Steele County, Minnesota.*

EXHIBIT 1.

"At the opening, and before the trial began, defendants offered in open court that plaintiff might take witnout contest a decree of foreclosure of the equitable mortgage. This offer was expressly re-

fused. It is now withdrawn. It was impliedly withdrawn upon its refusal."

Upon the back of said brief appeared the title and venue as above, followed by the following, (being that part so offered and admitted as above,) viz:

Personal service of the within brief is hereby admitted at Owatonna Minn. this 22nd day of June, 1897.

WHEELOCK & SPERRY,
Attorneys for Plaintiff.

EXHIBIT 2.

Complaint.

Venue and title as above.

The complaint of the plaintiff respectively represents and shows to the court—

I.

That heretofore, to wit, on the 19th day of February,
115 & 116 1895, this plaintiff became and still is the owner of the following-described premises, situate in the county of Steele and State of Minnesota, to wit: The south half of the southwest quarter, and the northeast quarter of the southwest quarter and west one-fourth of southeast quarter of section twenty-one (21), and northwest quarter and undivided one-half of west half of northwest quarter of southwest quarter of section twenty-eight (28), and northeast quarter and north half of southwest quarter, and undivided half of southwest quarter of southwest quarter of section twenty-nine (29), and north half of northeast quarter and north half of northwest quarter and southwest quarter of northwest quarter of section thirty-two (32), all in township 107 (107) north, of range twenty (20) west, and containing seven hundred and ninety (790) acres of land, more or less.

II.

That on said day this plaintiff entered into a contract with the defendants, Joseph A. Sawyer and Nellie A. Sawyer, wherein and whereby this plaintiff was to execute a deed to Joseph A. and Nellie A. Sawyer, or either of them, of the above-described premises and deposit the same in the hands of the defendant, L. C. Woodman, in escrow, to be delivered to the said defendants, Joseph A. and Nellie A. Sawyer, whenever they would fully comply with the terms and conditions of said contract. That a copy of said contract is hereto attached and made a part hereof, and marked "Exhibit A."

III.

That plaintiff did on said 19th day of February, 1895, make and execute a deed of said premises to said Nellie A. Sawyer and
117 deliver the same in escrow to said defendant, L. C. Woodman, a copy of which deed is hereto attached and marked

"Exhibit B," and that said plaintiff has in all things complied with his part of the terms and conditions of said contract.

IV.

That in and by the terms of said contract, said Joseph A. Sawyer and Nellie A. Sawyer were to pay this plaintiff the sum of one hundred dollars ($100) on or before the last day of February, A. D. 1895, and on or before the last day of each and every month thereafter continually, and on so doing and on the payment of the further sum of twenty thousand four hundred ($20,400) dollars the said defendants, Joseph A. and Nellie A. Sawyer, were to be entitled to the delivery to them of the said deed so deposited in escrow by this plaintiff with L. C. Woodman, and not otherwise.

V.

That in and by the terms of said contract and agreement it was contracted and agreed that upon the failure of the parties of the first part to pay said monthly payments all their rights under said contract should cease and determine, and that by reason of the failure of said Joseph A. and Nellie A. Sawyer to pay the amount due on or before the last day of January, 1896, all of their rights under said contract did cease and determine.

VI.

That in and by virtue of said contract these defendants, Joseph A. and Nellie A. Sawyer, went into possession of said premises and have continued in the possession and occupancy and use of
118 said premises ever since, which said premises consist of an improved farm in a high state of cultivation, with many valuable improvements thereon.

VII.

That said defendants, Joseph A. and Nellie A. Sawyer, have wholly neglected and failed to comply with the terms of said contract and have wholly failed to pay the sum of one hundred ($100) dollars per month, or any part thereof, during the months of January, February, March, April, May, June and July, 1896, and have wholly neglected and failed to pay any part or portion of the said sum of twenty thousand four hundred ($20,400) dollars and have wholly failed to pay any sum whatever except the amounts due for the year 1895.

VIII.

That said defendants, Joseph A. and Nellie A. Sawyer, have ever since the first day of January, A. D. 1896, wrongfully and unlawfully withheld from the possession of the plaintiff the premises above described, and that the value of the use and occupation of said premises during the time the same have been wrongfully and unlawfully withheld from the possession of the plaintiff is one hundred dollars ($100) per month.

IX.

That prior to the commencement of this action this plaintiff demanded and caused to be demanded of said defendants the possession of said premises, all of which have been refused.

X.

That prior to the commencement of this action plaintiff demanded of this defendant, L. C. Woodman, the delivery up to this
119 plaintiff of the deed of said premises so held in escrow by this defendant, L. C. Woodman, which demand was refused.

Wherefore plaintiff demands judgment against defendant, L. C. Woodman, for the delivery to this plaintiff of the deed so held in escrow by him and demands judgment against the defendants, Joseph A. Sawyer and Nellie A. Sawyer, for the possession of said lands and premises and that all rights of the defendants under said contract and deed be declared to have ceased and determined and for the sum of one hundred ($100) dollars per month since the first day of January, 1896, the value of the use and occupation of said premises and for such other and further relief as to the court may seem just and equitable and for his costs and disbursements herein.

WHEELOCK & SPERRY,
Attorneys for Plaintiff, Owatonna, Minn.

Duly verified July 29, 1896, by plaintiff in person.

Exhibit "A," referred to in said complaint, is the contract of February 19, 1895, and is found in full in the complaint in the present action, hereinbefore set out in full.

Exhibit "B," referred to in the above complaint in the deed executed by plaintiff to defendant, Nellie A. Sawyer, as one of the exhibits. Viz., Exhibit "G" offered in evidence at the former trial herein by the plaintiff and admitted.

EXHIBIT 3.

Answer in the Former Case.

Venue and title as above.

Answering the complaint herein the defendants, Joseph A. Sawyer and Nellie A. Sawyer allege:

120 I.

That on the 19th day of February, 1895, and for a long time theretofore these defendants were the owners and in possession of all the premises in the complaint described. That on that day these defendants were indebted to this plaintiff in certain sums of money, which together with other sums secured by certain liens on certain portions of said premises were then computed to amount to the sum of twenty thousand four hundred dollars. By agreement plaintiff took up and paid or had assigned to himself certain of these liens,

in consideration for his agreement to do — an agreement in writing was on said day entered into, of which said agreement Exhibit "A" in the complaint is a copy. In and by said agreement said defendant Joseph A. Sawyer agreed to repay to this plaintiff said sum of twenty thousand four hundred dollars as soon and as fast as he was able so to do, and until said payment should be made, to pay to plaintiff as interest the sum of one hundred dollars monthly, which said monthly payment was to be reduced proportionally to any and all payments made on said principal sum. At the same time and as part of the same agreement these defendants made, executed and delivered to this plaintiff a deed of warranty in terms conveying to plaintiff as grantee all the premises in the complaint described. As a further part and portion of said agreement plaintiff was to reconvey all said premises to this defendant Nellie A. Sawyer upon receiving payment of said sum—to which end the deed of which Exhibit "B" in the complaint, is a copy, was executed by plaintiff and delivered to the defendant L. C. Woodman, as a depository,
121 to be held by him until such payments should be made, when the same should be made, when the same should be by him delivered to these defendants. Subject to such agreement, these defendants are now, and ever since the same was made have been the owners of all said premises and in possession of the same.

II.

These defendants have fully complied with all the terms and conditions of said Exhibit A, save only that by reason of inability to collect certain sums due the defendant Joseph A. Sawyer in season so to do, they have as yet failed to pay the monthly installment of interest due for the month of January, 1896, and the months since. All which said monthly payments not now paid these defendants propose and offer to pay together with lawful interest on each thereof since the day when by the terms of said agreement the sum became severally payable.

III.

Defendants admit that the said premises constitute an improved farm, much of the same however being in timber and not productive as a farm save for the pasturage therein afforded. Save as herein alleged or admitted, these defendants deny each and every allegation and part thereof in the complaint contained. These defendants ask that upon payment of all sums in arrears by the terms of said agreement 7, together with interest to the time of such payments, that this action be dismissed.

Dated at Owatonna, Minnesota, August 22nd, 1896.

J. A. SAWYER,
Attorney for Defendants, Owatonna, Minnesota.

122 Duly verified.

Reply.

Venue and title as above.

EXHIBIT 4.

The plaintiff, for reply to the answer of the defendants Joseph A. Sawyer and Nellie A. Sawyer in the above-entitled action, denies each and every allegation of new matter in said answer contained.

Dated August 28th, 1896.

WHEELOCK & SPERRY,
Att'ys for Pl't'f.

Reply duly verified by plaintiff in person, before
W. A. SPERRY,
Notary Public.

EXHIBIT 5.

Original Findings and Order.

Venue and title as above.

This action, being at issue and on the calendar of this court at the present December term thereof, was on the 3rd day of said month, being still of said term, tried by the court; Wheelock & Sperry appearing for the plaintiff and Joseph A. Sawyer, Esq., for the defendants. I find the following as the facts duly admitted, or proven on such trial.

That on the 19th day of February, 1895, the defendant, Joseph A. Sawyer, was, and for a long time prior thereto had been the owner in fee of the premises described in the complaint and in the occupation of the same, and that the same consisted of an improved farm with many valuable buildings and improvements thereon. That on that date the said defendants were indebted to the plaintiff in a large sum of money and that there were then certain liens and claims against said premises, which the plaintiff either paid or had assigned to himself; so that on that date defendant
123 Joseph A. Sawyer was indebted to the plaintiff in the sum of twenty thousand four hundred dollars, and that the deed from the said defendants to the plaintiff mentioned in the pleadings was executed as security for the repayment to the plaintiff of said sum with interest thereon in the sum of one hundred dollars ($100) each and every month until said principal should be paid, said principal to run as long as said defendants desired and such interest was promptly paid. That the deed from said defendants to the plaintiff, the deed from the plaintiff to the defendant, Nellie A. Sawyer, deposited with the defendant L. C. Woodman, and the agreement set up in the pleadings, were all executed at the same time and as a part of the same transaction. That the defendants Joseph A. Sawyer and Nellie A. Sawyer have failed to comply with

the terms of said agreement by omitting and neglecting to pay interest for the month of January, 1896, and the months since that date.

As conclusions of law, I find:

That the instruments mentioned and set up in the pleadings constitute an equitable mortgage upon the premises therein described, and that upon default in the payment of the sum secured thereby plaintiff was entitled to foreclose the same. That there is due thereon from the defendant at the date of these findings the sum of eleven hundred thirty-five and eighty-three one-hundredths dollars ($1,135.83). That the plaintiff is entitled to judgment for said sum and for foreclosure and sale of the premises in question for the amount due as aforesaid in accordance with law and the practice of this court in such cases made and provided, unless the defendant Joseph A. Sawyer or the defendant Nellie A. Sawyer, shall,
124 before the entry of such judgment pay to the plaintiff or into court for his use, the amount so due with interest and costs.

Let judgment be entered accordingly.

By the court.

THOMAS S. BUCKHAM,
District Judge.

Dated December 21st, 1896. Filed January 2d, 1897.
GEORGE W. PEACHEY, *Clerk.*

EXHIBIT 6.

Plaintiff's Motion to Amend Findings of Law and Fact, and to Amend Their Complaint.

Venue and title as above.

To Joseph A. Sawyer, Esq., attorney for above-named defendants, Joseph A. Sawyer and Nellie A. Sawyer:

Please take notice: That the above-named plaintiff will, on the 13th day of February, 1897, at 9 o'clock a. m. of said day, move the court at his chambers in the city of Faribault, Rice county, Minnesota, for leave to amend the findings of law and fact in the above-entitled action, so that they shall read as hereinafter set out, attached and marked "Exhibit A."

And that the plaintiff will at the same time and place, move said court for leave to amend the complaint in said action to correspond with the facts proved and admitted upon the trial of said action so that it will read as hereinafter set out which said complaint as so amended is hereto attached, marked "Exhibit B."

And notice is further hereby given that the motion heretofore made by you in said matter will be brought up for hearing at the same time and place.

Dated February 1st, 1897.

WHEELOCK & SPERRY,
Plaintiff's Att'ys, Owatonna, Minn.

125 "EXHIBIT A," Attached to Above Motion.

Venue and title as above.

This action being at issue and on the calendar of this court at the present December term thereof, was, on the third day of said month, being still of said term tried to the court; Wheelock & Sperry appearing for the plaintiff and Joseph A. Sawyer Esq. for the defendants. I find the following as the facts, duly admitted or proven on such trial: That on the 19th day of February, 1895, the defendant Joseph A. Sawyer was, and for a long time prior thereto had been, the owner in fee of the premises described in the complaint and in the occupation of the same, and that the same consist of an improved farm, with many valuable buildings and improvements thereon. That on that date said defendants were indebted to this plaintiff in a large sum of money, and that there were then certain liens and claims against said premises, which the plaintiff either paid or had assigned to himself; so that on that date defendant, Joseph A. Sawyer, was indebted to the plaintiff in the sum of twenty thousand four hundred dollars, and that the deed from said defendants to the plaintiff mentioned in the pleadings was executed as security for the repayment to the plaintiff of said sum with interest thereon in the sum of one hundred dollars each and every month until said principal should be paid, said principal to run as long as defendants desired and such interest should be promptly paid. That the deed from the defendants to the plaintiff, the deed from the plaintiff to the defendant Nellie A. Sawyer, deposited with the defendant L. C.
126 Woodman, and the agreement set up in the pleadings, were all executed at the same time and as a part of the same transaction. That the defendants Joseph A. Sawyer and Nellie A. Sawyer have failed to comply with the terms of the said agreement by omitting and neglecting to pay interest due for the month of January, 1896, and the months since that date, and that no part of said principal sum of twenty thousand four hundred dollars ($20,400) has been paid.

As conclusions of law I find:

That the instructions mentioned and set up in the complaint constitute an equitable mortgage upon the premises therein described, and that upon default in the payment of the sum secured thereby plaintiff was entitled to foreclose the same. That there is due thereon from the defendants, Joseph A. and Nellie A. Sawyer, as such unpaid interest the sum of — dollars. That by reason of such default plaintiff is also entitled to recover herein said principal sum of twenty thousand four hundred ($20,400) dollars; that the plaintiff is entitled to judgment for said sum of — dollars and for foreclosure and sale of the premises in question by the sheriff of Steele county, Minnesota, in accordance with the provisions of the law relating to real estate on execution and the practice in this court in such case made and provided, and the proceeds thereof applied: First—to payment of the costs and disbursements of this action; second—to

the costs and expenses of foreclosure; third—to the payment of the amount of interest found to be due; and fourth—the balance to be applied to the principal sum due on said mortgage unless defendants, Joseph A. Sawyer and Nellie A. Sawyer, shall before the entry of such judgment pay to the plaintiff or into court for his use the amount of interest so found together with interest and costs.

127 Let judgment be entered accordingly.

BY THE COURT.

EXHIBIT "B," Attached to said Motion.

Venue and title as above.

That, heretofore, to wit, on the 19th day of February, A. D. 1895, the defendants, Joseph A. Sawyer and Nellie A. Sawyer, were the owners of and in possession of the following-described premises, (here describing said lands described in the original complaint, as therein described).

That on said day said defendants, Joseph A. and Nellie A. Sawyer, made, executed and delivered to said Daniel S. Piper a warranty deed of all said premises.

2. That on said day this plaintiff entered into a contract with the defendants, Joseph A. and Nellie A. Sawyer, wherein and whereby this plaintiff was to execute a deed to Joseph A. and Nellie A. Sawyer, or either of them, of the above-described premises and deposit the same in the hands of defendant, L. C. Woodman, in escrow, to be delivered to said defendants, Joseph A. and Nellie A. Sawyer, whenever they should fully comply with the terms and conditions of said contract; that a copy of said contract is hereto attached and made a part hereof and marked "Exhibit A."

3. That plaintiff did on said 19th day of February, 1895, make and execute a deed of said premises to said Nellie A. Sawyer, and deliver the same in escrow to said defendant, L. C. Woodman, a copy of which deed is hereto attached and made a part hereof and marked "Exhibit B," and that said plaintiff has in all respects complied with his part of the terms and conditions of said contract.

128 4. That in and by the terms of said contract said Joseph A. and Nellie A. Sawyer were to pay this plaintiff the sum of one hundred dollars on or before the last day of February, 1895, and on or before the last of each and every month thereafter continuously, as interest, and on so doing and on the payment of the further sum of twenty thousand four hundred ($20,400) dollars, the said defendants, Joseph A. and Nellie A. Sawyer, were to be entitled to the delivery to them of said deed so deposited in escrow by this plaintiff with L. C. Woodman, and not otherwise.

5. That in and by the terms of said contract and agreement it was contracted and agreed that upon the failure of the parties of the first part to pay said monthly payments, all of their rights under said contract should cease and determine, and that by reason of the failure of said Joseph A. and Nellie A. Sawyer to pay the amount due on or before the last day of January, 1896, all of their rights under said contract did cease and determine.

6. That these defendants, Joseph A. Sawyer and Nellie A. Sawyer, have continued in the possession and occupancy and use of said premises ever since, which said premises consist of an improved farm in a high state of cultivation, with many valuable improvements thereon.

7. That said defendants have wholly neglected and failed to comply with the terms of said agreement and have wholly failed to pay the sum of one hundred dollars ($100) per month or any part thereof during the months of January, February, March, April, May, June, July, 1896, and have wholly failed and neglected to pay any part or portion of the said sum of twenty thousand four hundred
129 ($20,400) dollars, and have wholly failed to pay any sum whatever except the amounts due for the year A. D. 1895.

8. That said defendants, Joseph A. Sawyer and Nellie A. Sawyer, have ever since the first day of January, 1896, wrongfully and unlawfully withheld from the possession of plaintiff the premises above described.

9. That prior to the commencement of this action this plaintiff demanded and caused to be demanded of said defendants the possession of said premises, all of which have been refused.

10. That prior to the commencement of this action plaintiff demanded of this defendant, L. C. Woodman, the delivery to this plaintiff of the deed of said premises so held in escrow by this defendant, L. C. Woodman, which demand was refused.

Wherefore plaintiff demands judgment against the defendant, L. C. Woodman, for the delivery to this plaintiff of the deed so held in escrow by him, and demands judgment against the defendants, Joseph A. and Nellie A. Sawyer, for the amount due this plaintiff thereon as interest and that said deeds and contract be declared a mortgage on said premises and that the same be foreclosed, and the premises in said complaint described, sold in accordance with law and the practice of this court, and the proceeds thereof applied to the payment of the costs and disbursements of this action, and the costs and expenses of foreclosure and the payment of the amount found due herein as interest and the balance to be applied on the principal sum due on said mortgage, and for such other and further relief as to the court shall seem just and equitable, and for the costs and disbursements of this action.

WHEELOCK & SPERRY,
Plaintiff's Attorneys, Owatonna, Minn.

130 Duly verified by the plaintiff in person.

Defendants' Notice of Motion.

Venue and title as above.

To the above-named plaintiff and to Messrs. Wheelock & Sperry, his attorneys.

Please take notice: That the motion to amend the court's findings of law in the above-entitled action, hereto attached, is based upon the pleadings and findings of fact therein, and is made and

will be argued upon the ground that the above-entitled action is brought for a purpose exclusive of the relief ordered in said findings of law: That the complaint therein does not allege facts sufficient to warrant such relief, but, on the contrary, does allege facts obnoxious thereto.

Also, that by said findings of fact each and every issue raised by said pleadings is found in defendants' favor, and that every material allegation in said complaint is negatived therein.

J. A. SAWYER,
Attorney for Moving Defendants.

Dated at Owatonna, Minn., this 9th day of January, 1897.

Defendants' Motion to Amend Findings.

Venue and title as above.

The above-named defendants, Joseph A. Sawyer and Nellie A. Sawyer, hereby move the court to amend its findings in the above-entitled action as follows, to wit:

1. To strike out the entire conclusion of law therein.
2. To substitute for said finding of law the following: "That the instruments mentioned in the pleadings, to wit, the contract
131 and the two deeds evidence one and the same transaction and agreement and constitute an equitable mortgage. That at all times mentioned in the pleadings the defendants, Joseph A. Sawyer and Nellie A. Sawyer, were and now are the owners of all the premises described in the complaint. That the plaintiff, not having instituted any action or proceeding to foreclose such equitable mortgage, and having elected in this action not to allege any facts upon which a foreclosure thereof can be ordered or had, is entitled to no relief herein. That said defendants are entitled to judgment for their costs and disbursements herein. Let judgment be declared accordingly."

Dated at Owatonna, Minn., this 9th day of January, 1897.

J. A. SAWYER,
Attorney for Defendants.

Substituted Findings and Order for Judgment.

Venue and title as above.

Findings of fact and conclusions of law having been heretofore filed in the above-entitled action, both the plaintiff and the defendants, Joseph A. Sawyer and Nellie A. Sawyer, moved the court to amend such findings and conclusions in the particulars set out in their respective notices of motion on file with the clerk of this court, and such motions were heard together by consent, at my chambers in the city of Faribault, in Rice county, on the 13th day of February, 1897, Wheelock & Sperry appearing for the plaintiff and Joseph A. Sawyer, Esq., for the answering defendant.

Ordered, that the conclusions of law be modified by substituting

for those in the original decision as filed, the following to
132 wit: "That the defendants are entitled to have this action dismissed without prejudice to plaintiff's right of action to foreclose his equitable mortgage set forth in the answer and have judgment so dismissing the case, but without costs. Let judgment be entered accordingly."

THOMAS S. BUCKHAM,
District Judge.

Filed February 20, 1897.

EXHIBIT 8.

Judgment of Dismissal.

Venue and title as above.

This action being at issue and on the calendar of this court at the regular December 1896 term thereof, was on the third day of said month, being still of said term, tried to the court, Messrs. Wheelock & Sperry appearing for the plaintiff and Joseph A. Sawyer Esq. for the defendants. And the court, after hearing the evidence adduced on such trial and duly considering the same, duly made and filed its findings, conclusions of law and order for judgment therein, and thereafter, and on the 13th day of February, 1897, the court heard the motion of plaintiff and defendants by consent of the parties thereto at his chambers in the city of Faribault, Rice county, Minnesota, Wheelock & Sperry appearing for the plaintiff and Joseph A. Sawyer for the defendants. And the court thereafter and on the 20th day of February, 1897, duly made and filed its modified order, substituting the following conclusions of law for those in the former order which was filed January 20th, 1897, viz: That the defendants are entitled to have this action dismissed without prejudice to
133 plaintiff's right of action to foreclose his equitable mortgage set forth in the answer, and to have judgment so dismissing the same, but without costs.

Now therefore, pursuant to said order and on motion of Messrs. Wheelock & Sperry it is hereby adjudged, determined and decreed that said action be, and the same hereby is dismissed without prejudice, right of action to foreclose his equitable mortgage, and without costs herein.

Signed and dated this 20th day of April, 1897.

G. W. PEACHEY,
Clerk of District Court.

Filed April 20th, 1897.

G. W. PEACHEY,
Clerk of District Court.

Amended Findings and Order.

Venue and title as above.

The above-entitled action having been heretofore tried by this court and findings and decision of the court made and filed and

judgment having been heretofore entered and an appeal from such judgment having been taken by defendants to the supreme court of said State which appeal has been tried and determined and the decision of said supreme court therein duly filed and judgment thereon duly entered reversing and setting aside the judgment so appealed from and all proceedings subsequent thereto in the enforcement of such former judgment of this court, and directing this court to modify and amend its findings as hereinafter set out; and said cause having been duly remanded to this court for that purpose and for further proceedings accordingly; and the cause having come
134 before the court at the court-house in the city of Owatonna, Steele county, Minnesota, in said district at the general term of said court commencing on the 6th day of December, A. D. 1898, upon the motion and application of said plaintiff, upon due notice given to said defendants, to have such amendment and modifications to said findings duly made and filed by this court, Messrs. Wheelock & Sperry and Robert Taylor, plaintiff's attorneys appearing in support of such application and H. E. Leach Esq. appearing on behalf of defendants upon such application. On motion of plaintiff's said attorneys, and in accordance with said decision and judgment of said supreme court the said former findings of this court herein are hereby modified and amended as follows:

I.

The last clause of the eighth finding of fact and all of the ninth finding of fact are hereby stricken out, and instead thereof the following is inserted, viz:

Ninth. Upon the said contract and transaction of February 19th, 1895, which is an equitable mortgage into which all the others have become merged and extinguished, there is at the date of these amended findings, due to the plaintiff the sum of twenty-three thousand and nine hundred dollars.

II.

The former conclusions of law herein, of this court be, and they are amended so as to read as follows, to wit: As conclusions of law herein the court finds: That said transaction of February
135 19th, A. D. 1895, was and is an equitable mortgage into which all said other mortgages became and are merged and thereby extinguished; and that, default having been made in the terms and conditions of said equitable mortgages, as aforesaid, the plaintiff is entitled to judgment of foreclosure thereof for the said amount of twenty-three thousand nine hundred dollars, so due thereon and for his costs and disbursements herein to be taxed and included in such judgment and for the costs of foreclosure sale, and that such foreclosure be made by sale of the lands covered by said equitable mortgage in accordance with law, subject to redemption as provided by statute.

In all other respects said former findings and decision are hereby affirmed. Let judgment be entered accordingly.

Dated this 8th day of December, 1896.

THOMAS S. BUCKHAM,
District Judge.

The above and foregoing case, having been by me examined and found conformable to the truth is by me on this 17th day of January, A. D. 1899, allowed, approved and signed as such case in the action therein described. And I further certify that the same contains true and correct exemplifications and records of all proceedings in this court had after the remand of said cause and of all offers, motions, rulings, orders, objections and exceptions therein had and taken.

Dated at Faribault, Minn., this 17th day of January, 1899.

THOMAS S. BUCKHAM.

136 STATE OF MINNESOTA, } ss:
County of Steele, }

District Court, Fifth Judicial District.

DANIEL S. PIPER, Plaintiff,
against
JOSEPH A. SAWYER, NELLIE A. SAWYER, and L. C. WOODMAN, Defendants.

The judgment heretofore entered herein on the 19th day of August, A. D. 1897, having been upon appeal to the supreme court, set aside and the cause having been remanded to this court with direction of the supreme court for the amendment in certain particulars of the findings of the court herein and such amendments to such findings having been duly made and filed herein and the plaintiff's costs herein having been duly taxed and allowed at the sum of thirty-five and twenty one-hundred- dollars.

Now therefore, on motion of Wheelock & Sperry, and Robert Taylor Esq., attorneys for said plaintiff and in accordance with said findings of this court so amended, it is hereby adjudged and decreed as follows:

I.

That the agreement of February 19th, 1895, set forth in the complaint and the transaction of which it was a part did and does extinguish by merger all of the former notes and mortgages in said complaint set forth; that the said agreement and transaction of February 19th, 1895, was and is an equitable mortgage of all of the lands therein described, to wit: The south half of the southwest quarter and the northeast quarter of the southwest quarter, and the west one-fourth of the southeast quarter of section twenty-
137 one (21) and northwest quarter, and the undivided half of the west half of the northwest quarter, of the southwest quarter of section twenty-eight (28), and the northeast quarter, and the north

half of the southwest quarter, and the undivided half of the southwest quarter of the southwest quarter of section twenty-nine (29), and the north half of the northeast quarter, and the north half of the northwest quarter, and the southwest quarter of the northwest quarter of section thirty-two (32), all in township one hundred and seven (107) north, range twenty (20) west, in said Steele county, Minnesota, containing in all seven hundred and ninety acres (790), more or less.

That the amount that is due upon said equitable mortgage at this date is the sum of twenty-four thousand and ninety-nine and $\frac{82}{100}$ dollars in principal and interest, and the further sum of thirty-five and $\frac{20}{100}$ dollars ($35.20) costs and disbursements taxed and allowed herein.

II.

It is further adjudged, that said equitable mortgage is a lien upon all of said lands for the amount so due thereon and that the same be foreclosed by a sale of said lands or so much thereof as shall be sufficient to satisfy the amount so due with the costs of sale, and that said lands be sold accordingly by the sheriff of said county or his deputy, according to the provisions of law relating to sales of real estate on execution. That said sheriff give public notice of such time and place according to law; that said plaintiff may become the purchaser at such sale if he shall be the highest bidder thereat and that the sheriff make due report to the court of such sale when made, and upon such confirmation, execute and
138 deliver to the purchaser or purchasers at such sale the usual certificates as provided by law. That out of the proceeds of such sale, after deducting the amount of his fees and disbursements on such sale, the sheriff pay to the plaintiff's attorneys the sum of thirty-five and $\frac{20}{100}$ ($35.20) dollars, the costs and disbursements aforesaid, with interest thereon from this date; and also the said amount adjudged to be due to the plaintiff on said equitable mortgage with interest thereon from date hereof, if such proceeds of such sale be sufficient for that purpose and if there be any surplus money arising from such sale that he bring the same into court to abide the further order of the court herein.

III.

It is further adjudged and decreed, that said defendants and all persons claiming under them be thereupon forever barred and foreclosed of all right, title and equity of redemption in and to said mortgaged premises so sold except only the right of redemption from such sale according to law.

That plaintiff recover of the defendants, J. A. Sawyer and Nellie A. Sawyer, his said costs and disbursements of thirty-five and $\frac{20}{100}$ ($35.20) dollars.

Dated this 19th day of January, 1899.

GEORGE W. PEACHEY,
Clerk of said District Court.

[Seal of District Court.]

139 STATE OF MINNESOTA, } ss:
County of Steele, }

District Court, Fifth Judicial District.

DANIEL S. PIPER, Plaintiff,
against
JOSEPH A. SAWYER and NELLIE A. SAWYER, Defendants.

To the plaintiff above named and to Messrs. Wheelock & Sperry and Robert Taylor, his attorneys, and to G. W. Peachey, clerk of court:

Please take notice—That the above-named defendants, Joseph A. Sawyer and Nellie A. Sawyer, appeal to the supreme court of the State of Minnesota from the judgment rendered and entered in the above-entitled cause on, and dated on the 19th day of January 1899, finding the amount due on the equitable mortgage described therein and ordering the lands therein described to be sold to satisfy such amount. Said appeal is taken from the whole of said judgment.

Dated at Owatonna Minnesota this fifth day of July, 1899.

J. A. SAWYER,
Att'y for Defendants.

STATE OF MINNESOTA, } ss:
County of Steele, }

Harlan E. Leach, being first duly sworn, says that at the city of Owatonna, in said county and State, on the 15th day of July A. D., 1899, he served the hereto-attached notice of appeal upon Messrs. Wheelock & Sperry, a firm composed of L. L. Wheelock and W. A. Sperry, and Robert Taylor personally, by then and there handing to and leaving with said W. A. Sperry,
140 one of the members of said firm of Wheelock & Sperry, a true and correct copy of said notice of appeal; said Wheelock & Sperry and Robert Taylor being then and there the attorneys of the plaintiff in the above-entitled action.

HARLAN E. LEACH.

Subscribed and sworn to before me this 17th day of July, 1899.

GEORGE W. PEACHEY,
[SEAL.] *Clerk of District Court, Steele County, Minn.*

141 STATE OF MINNESOTA, ss:

Supreme Court, October Term, 1899.

DANIEL S. PIPER, Respondent,
against
JOSEPH A. SAWYER, NELLIE A. SAWYER, and L. C. Woodman, Defendants; Joseph A. Sawyer and Nellie A. Sawyer, Appellants. } Appellants' Brief.

Assignments of Error.

I.

The court erred in denying defendants' motion for leave to file their supplementary answer.

II.

Erred in excluding that answer at the hearing in open court at the regular December, 1898, term thereof.

142 III.

Erred in excluding the record evidence then offered by the defendants.

IV.

Erred in ordering judgment against the defendants.

V.

Erred in not holding that the plaintiff had waived all right to foreclose the equitable mortgage.

VI.

Erred in not holding that the plaintiff had elected to pursue an inconsistent remedy and had precluded himself from foreclosing the equitable mortgage.

VII.

Erred in depriving defendants of their right to present their defense and to be heard thereon.

VIII.

Erred in depriving defendants of their property without due process of law.

IX.

Erred in denying to defendants the equal protection of the laws.

Statement of Facts.

Appeal by the defendants, Sawyer, from a judgment entered after the remand upon the former appeal. 76 N. W. R. 57.

Upon that remand appellants moved to file their supplementary

answer. Plaintiff moved for amended findings and judgment thereon without opportunity to appellants to present any defense.

Upon an adjourned hearing plaintiff withdrew his motion.

143 Thereafter appellants renewed their motion to file their supplementary answer, which was resisted by plaintiff and denied. Upon a new motion by plaintiff, the court did amend its findings and order judgment of foreclosure of the contract thereon, which was entered and this appeal taken therefrom upon a settled case.

The court refused defendants' proffered defense and excluded all evidence in support thereof offered at the hearing. The evidence so offered and excluded shows these facts—in July 1896, the plaintiff brought an action in ejectment against these three defendants based upon the contract here foreclosed demanding also damages for the retention of the lands.

The complaint was duly verified by the plaintiff and in it he alleged that he was the owner in fee of the land under this contract and the deed accompanying it. Answer and reply.—Findings that the contract and deed constituted an equitable mortgage, which was ordered foreclosed.

Upon the filing of such findings and order, appellants moved to amend the same and for judgment of dismissal. Plaintiff moved to file, *nunc pro tunc*, an amended complaint alleging defendants to be the owners, that the contract and deed constituted a mortgage and praying its foreclosure.

The motions were heard together, the court denying that of the plaintiff and granting that of appellants.

Thereafter, without notice, plaintiff caused judgment of dismissal, without costs and without prejudice, to be entered—appellants having no knowledge thereof until the service of the reply herein, and brought this action to foreclose the four formal mortgages.

144 At the opening of the trial, appellants formally offered that judgment be entered without contest—foreclosing the contract, which offer was refused by plaintiff.

Before submitting the case to the trial court, appellants withdrew the offer. Judgment being ordered and entered foreclosing the four mortgages, the former appeal was taken.

Appellants claiming those mortgages to have been merged in and terminated by the contract, and that no foreclosure of the contract should be ordered under the complaint herein.

Appellants' Position.

I.

The defense offered and sought to be interposed, is not excluded by the former decision of this court.

II.

The supplementary answer states a valid defense.

III.

The evidence offered and excluded, sustained such defense and would warrant findings and judgment of dismissal of this action.

IV.

Under the circumstances then existing, such evidence should have been admitted and the defense thereby offered decided.

V.

By the rulings and judgment, the appellants are deprived of their rights under the Constitution of the United States, in this, viz: they are deprived of their property without due process of law; and are denied the equal protection of the laws.

145 *Points and Authorities.*

I.

This defence is not excluded. No defense to any existing rights to foreclose the contract was presented to nor decided by the trial court. Hence could not be in this court.

Marcutt *vs.* Marquette R'y Co. 47 Mich. 1.
Woodbridge *vs.* Sellwood, 65 Minn. 135, 67 N. 799.
Hove *vs.* Bankers' etc. Bank, (Minn.) 77 N. W. 967.
Combs *vs.* McDonald, 43 Neb. 632—62 N. 41.
Maxwell *vs.* Graves, 59 Ia. 613—13 N. 758.
Bartemeyer *vs.* Iowa, 18 Wall 129–135.

Plaintiff expressly refuses, at the opening of the trial, to take any judgment other than that demanded and ordered, viz: foreclosure of the four mortgages, appellants could not interpose this defense, and need not have raised the question of practice on that appeal—but since in case of reversal, it would lie at the threshold of further proceedings, they did. But it is to be noted that they raised and submitted no more than the question of pleading and practice—not at all any matter of defense as against a right then in plaintiff to foreclose the contract. Indeed it was not possible at that time to raise this defense. It did not exist. In part, it is a conclusive election of remedies and an election, at the trial, between inconsistent causes of action. When that appeal was submitted, such election had not become conclusive in the sense of excluding further prosecution—could not until judgment of reversal had been entered.

Plaintiff still stood upon that judgment—it remained in force.
146 He could continue to stand upon it until the final decision (judgment) reversing it, or *at any time prior* to such final decision, he could withdraw, take a dismissal, or amend and claim under the contract.

Thomas *vs.* Josten, 36 Minn. 1–3.
Ward *vs.* Green, 30 S. W. R. 864–866.

In a case like this, it is only where a party "pursues his chosen rights to final judgment" that the estoppel or waiver by election becomes final and conclusive.

"Where a party having a choice of remedies pursues one of them "to *final judgment*, he thereby makes an election by which he must "be held to be estopped, and he cannot have successive suits *in order* "*to determine whether or not he might recover*, upon a phase of the case "not presented at first."

Ward *vs.* Green, Tex., S. W. R. 866.

The expression by word or act of a preference between two courses does not estop from following, nor waive another right or remedy—else the mere service of a summons upon the one would bar
147 the other. There exists a "*locus penitentæ*." But when the selected right and remedy are insisted upon until it merges in or is extinguished by final judgment, then the door is closed. The party has had his full day in court—and can have no other. It is in the nature of *res adjudicata*, and rests upon identical grounds of public policy. *Nemo bis vexari pro eadem cause: Interesse rei publicæ ut finis sit litium.*

Not being before the court, nor necessary to the decision reversing the judgment, any remarks in the opinion bearing upon such defense (if there be such) are dicta. That opinion and judgment become the law of the case to the extent that plaintiff was not prevented by his pleading, from seeking a foreclosure of the contract in this action, but no further.

It did not and could not decide upon the validity of any defense defendant might interpose nor prevent them from interposing and litigating the same.

Wixson *v.* Devine, 80 Cal. 385, 22 p. 224–225–.8
See S. C. 67 Cal. 346 p. 779.
Hart *v.* Stripling, 25 Fla. 433–680 456:459.
Adams Co. *v.* B. & Mo. R'y 55 Ia. 94–44 Ia. 335 39 Ia. 505.
Chicago etc. R'y *v.* Swan, 120 Mo. 30, 25 S. W. 534.

II.

Supplementary answer states a defense.

In the matters therein alleged are matters of record in the
148 trial court, and in suits between those identical parties concerning plaintiff's rights under this contract and in the same lands—no possible question thereof as to the absolute truth of its allegation.

The facts shown are—that at the outset the plaintiff sued these defendants in ejectment demanding possession of the lands and damages for their withholding—basing such demands solely upon this contract and the deeds which are part of it. The trial court held the contract to be an equitable mortgage. Thereupon plaintiff moved to amend and procure the foreclosure of the equitable mortgage in that action. Failing in that he caused the entry therein of judgment of dismissal—and at once brought this action

to foreclose—not the equitable mortgage, but the former formal mortgages, and at the trial, refused to accept any other relief.

With knowledge of all the facts and the law, he elected to stand upon the former mortgages—and at the trial elected between the inconsistent causes of action shown in his complaint, and then by his refusal of all the relief to which he would have been entitled had he followed his real cause of action and sought his actual remedy, he precluded and estopped himself from asserting—when charged that he had elected his remedy—that he had but followed a vain quest, sought an impossible remedy.

Heckman *v.* Young, 134 N. Y. 170.

By the offer of judgment foreclosing the contract, the course elected to be pursued by plaintiff became issuable in complete relief to him.

149 Having refused that offer and thereby compelled defendants to litigate the matter throughout the trial court, and their appeal to this court, is estopped to assert that he but sought an impossible remedy upon a non-existing cause of action. The reason giving rise to that exception is that in such case it is impossible to secure a final disposition of the case on the merits. 7 Enc. Pl. & Prac. 365 note.

By refusing the proffered complete relief, and insisting upon that demanded until final judgment in this court against him, he conclusively waived the other remedy—and is bound by his election, made when he brought this action, between inconsistent remedies. The offered remedy was not withdrawn until the submission of the case upon briefs subsequent to the trial. Knowing during all that time that under that offer his suit as brought and insisted upon was, at least, by the offer, made effective in full relief,—he chose to insist upon his demands for the large additional sums demanded, his election then made, relates back to, and vivifies his original election between the inconsistent remedies, each of which thereby becomes available to him in full relief.

The causes of action and the remedies thereupon are incon-
150 sistent. The complaint alleges (fol. 34 former P. B.) that plaintiff had declared a forfeiture by defendants of all rights under the contract, the finding (fol. 150 do.) set forth that declaration, and the judgment (fol. 169 do.) determines as matter of law and fact, that all defendants' rights under the contract had ceased and determined.

In respondents' former brief (p. 11) he states this position in effect that the contract was *functus officio* and could not be foreclosed—the contract could secure (collaterally) no more than the $20,400, while the mortgages secure other and larger sums. Electing to stand upon the latter, the plaintiff perforce, disclaimed the former, and treated it as of no present force—as no security. But he now claims that the mortgages were extinct and the contract alone of force. He then repudiated the $20,400 of the contract and demanded $23,000 of the mortgages.

Now he treats the latter as non-existing, and the former as actual.
Thompson *v.* Howard, 31 Mich. 309: 62 N. 345.
Thomas *v.* Watt, 104 Mich. 201 and cases cited.

The remedies are inconsistent. The action to foreclose the mortgages was at law—and upon the statute.

151 The action to foreclose the contract is one strictly in equity.

The former action was upon several distinct causes of action—the latter upon one only. The former gave, which the latter refuses, the stipulated attorneys' fees.

To constitute an election of remedies it is not essential that at all times some remedy is available in the course elected.
Nield *v.* Burton, 49 Mich. 53. 12 N. W. 906.
Thomas *v.* Watt, 104 Mich. 201. 62 N. W. 345.

Nor is it material that the complaint, construed under the decisions of this court, may authorize recovery upon either cause of action. It is the election and prosecution as a matter of fact, that is essential.
7 Enc. Pl. & Prac. 362 note.

Election goes not to the form but to the essence of the remedy. It applies to a case where the law, not the practice supplies to a party two or more modes of procedure predicated upon conflicting theories.

152 III.

Plaintiff at the trial, was required to, and did elect between two inconsistent causes of action.
That the two are inconsistent is shown above.
That he could be required to elect follows.
By their offer of full relief upon one cause of action, defendants in effect required him to elect.
But whether or not required so to do, the plaintiff did elect by refusing the offer.

IV.

The evidence offered and excluded supports every averment in the supplementary answer. Hence sufficient to warrant findings for defendants.

V.

Respondent contended, in opposition to the filing of the supplementary answer that all its averments were already in the record—hence before the court without further pleadings. Upon that ground defendants needed no new trial—hence needed not to seek it.
But plaintiff moving for judgment upon the record, it was competent to defendants to oppose such motion by showing by the records that plaintiff was not, but that defendants were entitled to judgment.
The evidence offered—being of record should have been received and considered by the court. Its exclusion was error.

VI.

153 While no new trial was directed by this court yet it was competent for the trial court to direct a new trial in whole or in part upon application.

Adams Co. *v.* B. & M. R'y. 44 Ia. 335.
Adams Co. *v.* B. & M. R'y. 55 Ia. 94. 2 N. W. 1056.
Nat'l Inv. Co. *v.* Nat'l Bldg. etc. Co. 51 Minn. 198–200.

But a new trial would be bootless unless the supplementary answer was allowed. Hence proper for defendants to first move to file such answer, and upon denial of that motion, they were not required to move farther.

Ency. Pl. & Prac.

VII.

By the orders and judgment of the trial court, defendants were pr-cleuded from a day in court, upon their defense.

And were deprived of their property without due process of law.

And denied equal protection of the laws.

Since facts not in the record cannot be presented by affidavit or certificate, to obtain a re-argument (Smith *v.* St. Paul, 72 N.
154 W. 210) and since the defense upon the merits was not before this court, its denial of the petition to amend opinion etc. is understood to rest upon the ground here stated and not to indicate an intention by this court to go beyond the record.

Backus *v.* Burke, 52 Minn. 113.

It is respectfully submitted that the judgment should be reversed, and the cause remanded with direction that defendants be allowed to renew their motion to file their supplementary answer.

———,
Att'y for Appellants, Owatonna, Minn.

155 STATE OF MINNESOTA:

Supreme Court, October Term, 1899.

DANIEL S. PIPER, Respondent,
against
JOSEPH A. SAWYER ET AL., Appellants.

Reply Brief by Appellants.

The defense of waiver and by election was not before this court upon the former appeal. To construe that decision as *res adjudicata* here is to make it a nullity.

The sole then assignment of error now pertinent is No. 5, viz. "The court erred in not ordering judgment of dismissal." At that trial below and here respondent stood upon his ground that the four formal mortgages remained in force, and insisted upon the remedy of their foreclosure. The trial court holding with him, could not and did not consider any other matter.

Respondent sold the lands under the judgment there demanded and entered. Appellant need have raised no other assignment of error, but submitted the above only as matter of pleading and prac-

tice and upon the grounds, (1) insufficiency of the complaint, and (2) that plaintiff could not so change position. All confined to this point, that in this action no foreclosure of the equitable mortgage could be had.—Former Brief, p. 27—76 N. W. 58, Paper Book, fo. 56.

Respondent cannot be heard here to claim this matter as then decided. In his then brief (p. 4, fo. 9) he rightly treated
156 the matter as one solely of pleading. As clearly he stated his then position, viz: That in no event was any foreclosure of the equitable mortgage possible unless, perchance, for the monthly payments then due. His brief pp. 11–13, fos. 30–31–34–35. In the trial court he then was equally precise. His complaint alleged a total forfeiture of all rights under the contract, and a prior demand for possession of the lands based thereon. He claimed nothing under the contract save that by the default in meeting its monthly payments the powers of sale of the formal mortgages became operative, and applied the payments made under the contract, not upon the sum due under the equitable mortgage, but as part payments of the accrued interest upon the notes secured by the former, and demanded judgment for the sums so secured—larger by thousands of dollars than that fixed and secured in the latter. These claims are carried into the then findings and judgment of the trial court. "Default has been made in the terms of said agree-"ment—and that said agreement and the rights of said defendants "thereunder, be, and they are determined, and have ceased." (1st P. B. p. 57, fo. 169 p. 51 fo. 150.) That judgment applied those payments as above and was for the amounts due by the terms of those notes with specified attorneys' fees, etc., being for nearly $3,000.00 in excess of the total sums then payable by the terms of the contract.

Adhering to the end to these positions and demands respondent cannot now insist upon such construction of the former opinion to establish in his favor as the law of the case what was not then claimed by either party and is in direct conflict of his then position and demand.

But his construction nullifies that portion of that opinion, mandate and judgment. The defense offered below, but there refused consideration, did not exist and could not be presented or argued upon the appeal. Appellants were not and could not then be heard upon it. All which appears upon the record. Therefore any attempted decision thereon at that time could be no more than a nullity.

157 Windsor *vs.* McVeigh 93 U. S. 277.
McCoy *vs.* McCoy 29 W. Va. 795.
Jones *vs.* Davenport 40 N. J. Eq. 77.
Reynolds *vs.* Stockton 140 U. S. 254.
Seamster *vs.* Blackstock 83 Va. 233.
Falls *vs.* Wright 55 Ark. 562.
Ringgenberg *vs.* Hartman 124 Ind. 186.
Ex parte Nielsen 131 U. S. 176.
Ex parte Zeehandelaur 71 Cal. 238.
Mitchell *vs.* Insley 33 Kan. 654.

In McCoy *vs.* McCoy *supra* Green, J., writing the opinion, considers this matter fully. Therein it is held that "if the status of "the suit, when the decree was rendered, was such that any of the "parties had then or prior thereto, the opportunity to present any "proof as to the facts bearing on these points decided and had no "opportunity to be heard on the law involved in the decision when "it was rendered, he could not be bound by such a decree as *res* "*adjudicata*. It matters not that when such decree was rendered, "such person was a party to the suit, if for any reason he had no "opportunity to be heard." Again the principles of *res adjudicata*, "Must yield to the still more fundamental principle that no one can "be bound by any judgment or decree, if, when it was rendered, the "record of it shows he had no opportunity to be heard, then or "before, on the questions of law or fact decided, whether the decision "be prejudicial to his rights in the cause in which it is rendered or "be only prejudicial to his rights in a subsequent suit."

In the Seamster case a widow had brought suit to compel the assignment of her dower making the heirs-at-law defendants. The court decreed the assignment of her dower and also the sale of the interests of the heirs. Thereafter one of the heirs, becoming of age, filed a petition, alleging errors and attacking the decree and the sale thereunder but the court dismissed his petition—the purchaser at such sale having paid the full purchase price, which, by
158 order of the court had been invested for the benefit of the minor heirs. It was held that the judgment and sale were void. And that the subsequent decree dismissing such petition of no force. No *res adjudicata*.

In Jones *vs.* Davenport, the syllabus (by the court) is—"A decree "or judgment outside the issues raised by the pleadings, is a nul-"lity."

In Reynolds *vs.* Stockton, the court by Brewer justice, said: "It "is impossible to concede that because A and B are parties to a suit "the court can decide any matter in which they are interested, "whether such matter be involved in the pending litigation or not. "It is only over these particular interests which they choose to "draw in question that a power of judicial decision arises." Again, "A judgment upon a matter outside the issue must of necessity, be "altogether arbitrary and unjust, as it concludes a point upon which "the parties have not been heard. It is upon this very ground that "the parties have been heard, or have had the opportunity of a "hearing, that the law gives so conclusive an effect to matters ad-"judicated. And this is the principal reason why judgments be-"come estoppels. But records or judgments are not estoppels with "reference to every matter contained in them. They have such effi-"cacy only with respect to the substance of the controversy and its "essential concomitants."

Mitchell *vs.* Insley was a suit to foreclose an equitable mortgage—a deed delivered as security. Plaintiff had sued defendant in ejectment claiming under that deed. In that suit the answer was a general denial. The issues therein by agreement were submitted to the court with mutual request to find the facts specifically. The court

found that the deed was delivered as security for a specified sum no part whereof had been paid and that the plaintiff held a lien on the land for that sum, but concluded as matter of law, that his remedy was not by ejectment and ordered judgment of dismissal which was entered. In the foreclosure suit the plaintiff asserted the former finding and judgment to be *res adjudicata* as to the sum un-
159 paid and due. The trial court so held but the supreme court held the contrary.

In Falls *vs.* Wright a widow had petitioned for an assignment of dower in her deceased husband's lands—but her petition in describing them omitted one tract Commissioners were appointed, who assigned her dower in all the lands Upon their report the court entered its decree setting off dower in all. Subsequently the tract omitted in that petition was sold by order of that court—but it refused to confirm the sale on the ground that it had been assigned as dower to the widow. But upon appeal from the refusal to confirm, the circuit court confirmed the sale. The plaintiff claimed title as heir to the deceased husband—his father—the defendants, under such sale and confirmation being remote grantees The attack upon that decree was collateral. Upon the appeal the supreme court held the decree void, as seeking to determine a matter not within the issues and upon which the parties had not been heard. The court cites the passage from Munday *vs.* Vail 34 N. J. Law 320, cited by Judge Brewer as above.

The cases cited above from 131 U. S. and 71 Cal. are cases of *habeas corpus*, and hold similar judgments under which the petitioners were imprisoned to be void. In the latter case the imprisonment was for contempt in refusing to answer at trial a question held by the supreme court not to be material upon the real issue before the court.

In Ringgenberg *vs.* Hartman, it is held that in replevin, wherein the pleadings raise an issue of right to possession only, so much of the judgment as purports to determine the title to be void. This court treats "the law of the case" merely as *res adjudicata*, but no distinction elsewhere taken between the two is material upon this point. Any direction to the trial court which precludes a party from obtaining "his day in court" can be no less unavailing than a final judgment of that effect.

Assigning only the question of pleading, not only were appellants not required to present a defense upon the merits, but such
160 course would have been out of place. No issue was made in the pleadings as to the equitable mortgage, nor as to whether it was enforcible. The complaint did not demand its foreclosure, save in connection with, and as a part of, that of the formal mortgages. Respondent then demanded an affirmance of the judgment foreclosing the latter. It is the relief actually demanded which determines whether or not the point passed upon is *res adjudicata*.

Van Fleet, Former Adjudication sec. 229.
Stannard *vs.* Hubbell, 123 N. Y. 520.
House *vs.* Lockwood 137 N. Y. 259.

In this case Mrs. Lockwood had sued House to obtain a deed executed by him to her alleging title to the land was in her and that the deed had been delivered, but again entrusted by her to him for safe keeping. He answered that Mr. and Mrs. Lockwood had conveyed the land to him as security for certain indebtedness which had not been paid, that he executed the deed in question for delivery when the debt was paid and had never delivered it. The court found each point for that defendant and entered judgment for him upon its findings. He then sued to foreclose the deed as a mortgage and pleaded the former judgment as *res adjudicata*. But the court allowed the Lockwoods to contest, and the jury found for them, viz: That Mrs. L. owned the land the title being in Mr. L. That they deeded to House and he redeeded to Mrs. L. in order to place the record title in her. That no security was intended, nor effected thereby. Upon appeal this was sustained in the supreme court and court of appeals. In the latter it was said, "A judgment "does not operate as on estoppel as to immaterial or unessential "facts, even though put in issue by the pleadings and directly "decided." Also, "Although a decree in express terms professes to "affirm a particular fact, yet, if such fact were immaterial to the "issues, and the controversy did turn upon it, the decree will not "conclude the parties with reference to such fact." Also, "In Wood-"gate *vs.* Fleet," (44 N. Y. 1) "it was held that the parties to a judg-
"ment are concluded or estopped thereby, only as to the facts
161 "or law material to the issue and directly involved in the
"litigation." See sec. 1 Van Fleet Form. Adj. p. 512, and sec. 2, secs 664–676–671. (Law of the case.)

Klauber *vs.* San Diego, etc. Co. 98 Cal. 105 (32 P. R. 876) is decisive upon this claim of *res adjudicata*. Suit to enforce specific performance. Plaintiff had appealed from a judgment for defendant, whereon that judgment was reversed and the trial court was expressly ordered to enter judgment upon its former findings for plaintiff in accordance with the prayer of the complaint, (30 Pac. R. 555–'6–95 Cal. 333). From the judgment so entered, defendant appealed upon a bill of exceptions. Plaintiff set up the prior decision on appeal as *res adjudicata*, but was overruled. The court says (pp. 876–877 p. 32 P. R.) "Being a rule which tends to prevent a judicial "consideration of the case, it is not to be extended beyond the "exigencies which demand its application."—"As it is only when "upon the second appeal, the record presents the same matters, "either of fact or law, upon which the determination of this court "was rendered at the former appeal, that that determination is held "to be final, it follows that if there is presented upon the second ap-"peal a different state of facts or any errors that were committed by "the trial court which were not presented in the former record, this "court is at liberty to consider them as fully as though presented "upon a first appeal."—"If, upon such appeal, there are found in "the record matters which were not determined upon the former "appeal, he has a right to be heard thereon."

In this case the error relied upon antedated the entry of the first

judgment in the trial court and appellants' assignments of error assailed the findings of fact.

In Michigan Trust Co. *vs.* Lansing Lumber Co. (Mich.) 80 N. W. R. 282 the plaintiff as trustee had sued to foreclose defendant company's mortgage and in that suit had a receiver appointed. On appeal the order appointing the receiver was reversed upon the ground
162 that no cause was shown to warrant a foreclosure. Thereafter another action was brought against that defendant and his surety to foreclose the same mortgage and hold the surety for any deficiency. The trial court dismissed it as to the surety upon the ground that by the former decision on appeal it became *res adjudicata* that no grounds for a foreclosure then existed, hence that the taking of the mortgaged property by the receiver was an unlawful interference releasing the surety. But upon appeal this was reversed, the court holding its former decision as to the lawfulness of that attempt to foreclose, was not upon the merits but only as preliminary and incidental to its ruling upon the receivership and that that question was essentially one of pleading only.

But respondent's construction of the former decision, involving as it does, the nullity of the portion relied upon, is not only inadmissible but wholly uncalled for. The rule is universal that any decision must be read in the light of the record before the court. Suppose that upon that remand appellants had fully paid the sum secured or that upon consideration respondent had released his lien or by acts *in pais* estopped himself from asserting it would a supplementary answer setting up those facts have been precluded by that decision? Or had appellants been able to set forth either of these defenses, would they not have been entitled to be heard upon them though denied by respondent? This court in set terms stated the sole question touching this matter then before it, viz: Appellants claim that in this action the contract could not be foreclosed, and also stated the grounds relied upon, viz: Of pleading and practice only. It is settled law here as elsewhere that where judgment is not peremptorily ordered the trial court is at liberty to consider and determine upon any competent matter not before cognizable by the court, and to that end may grant a new trial.

It is also necessary that any matter of defense upon the merits be formally alleged in the answer so that an issue of law or fact may be raised thereon before it can be determined by the court.

The petition for a modification of the opinion filed by
163 appellants, neither afforded them an opportunity to present their defense nor did they thereon in any manner seek a hearing or determination thereon. Anticipating the view respondent would take as to the effect of that decision, as well as its effect upon appellants' efforts to make a just settlement, the two reasons for its filing were plainly stated in the petition, viz: (1) To avoid otherwise certain defeat in their efforts to obtain a settlement and (2) to call the attention of this court to the fact that they had in no manner presented the matter of defense upon the merits to either the trial court or here. For they could but know that if this court had inadvertantly overstepped the record it would promptly correct such

error. The denial of that petition was notice to all that no matter of defense upon the merits was considered or determined by this court. There seems little doubt but that the fact that the matter was remanded to the trial court instead of an entry here of the judgment, or a peremptory order of judgment for respondent for the amount shown by the pleadings to remain unpaid on the equitable mortgage should of itself have advised each party that this court had not attempted to pass upon a matter not submitted to it.

Of the authorities cited by respondent (Brief fo. 33) II Enc. Pl. and Pr. 381 holds in terms, "The principle is sharply limited to "decisions on a prior appeal on points necessary to a determination "of the cause. On matters not essential, or questions incidental or "not considered, the court is not conclusively bound on the second "appeal." Followed by the passage he there cites, wherein it relies solely upon the second case he cites, viz: Adams *vs.* Fisher 75 Tex. 657. But neither authority is in point.

In the case cited, upon the first appeal the supreme court did fully consider and decide each of the two questions, touching the merits, which were directly presented by the record and fully argued by both counsel and held against the appellant on both, but upon a matter of minor importance not going to the merits there was a reversal in their favor. The second appeal squarely presented
164 the two identical points and the appellants were held concluded not merely on the ground of *res adjudicata* but in that the former decision was entirely correct.

In asserting (fo. 30 Brief) that the present question was raised below and upon the former brief, they mistake either the point or the fact. My former briefs are on file here and consider only the matter of pleading with that of practice, viz: That under the complaint, and after planting themselves at the trial squarely upon the formal mortgages, refusing all other relief, upon appeal they could not shift their ground. (Former Brief p. 15–16 Reply Brief pp. 1–4.) In the trial court my position was the same. In neither did I argue or submit any matter of defense upon the merits nor any matter of general defense. No error in the trial court touching this matter existed. Hence appellants could not assign upon it in this court, therefore they cannot be precluded on this appeal.

Smith *vs.* Borgenschultz, (Ky.) 20 S. W. R. 390–'1.

II.

The supplementary answer (and the evidence offered at the hearing but excluded) are sufficient to have required the trial court to consider and decide upon them. His refusal is error.

At page 12 (fo. 34) of this brief, respondent protests against any consideration of such error. In this he is consistent. Throughout the trial and former appeal he stood upon his mortgages—yet this court did determine the matter of pleading. Under cover thereof he succeeded below in preventing a hearing and obtaining an *ex parte* judgment. He now demands its affirmance in that, because of his election we are precluded from setting up his waiver of the lien that judgment forecloses. His consistency takes another step.

At the trial below he said—"Though the contract was fair and complete yet under its antecedent subject-matter I demand three thousand dollars more than that contract allows." In refusing the offered relief of every dollar owing him he said—"I insist upon
165 the opposite recovery since it is so much larger—therefore the offer is refused." In this court he said—"The contract moneys have no charm to loose my grasp upon the pound of flesh. Be my decree affirmed." But now his cry—"My shekels; Oh! my shekels; forget the drops of blood. Absolve the forfeit. Endanger not my shekels. By the contract they are mine."

The courts recognize and enforce the economic law that capital cannot always require its employer to carry all the risks incident to its use. Yet here a decision is demanded which shall saddle upon the user all the risk, not indeed of the use of the money, but consequent upon respondent's unjustifiable insistence upon the extra thousands. He said to the user "I am certain that I can force you "to pay me the thousands beyond our contract. But if I fail in this "I shall be no loser. Time enough then for me to accept your offer "of my entire just dues. Should you, meantime, withdraw it I "shall force that sum at least, from you." He now expects this court to justify his position.

Of his cited cases *Re* Van Norman lends small aid. That was a race between creditors. Lapp & Co. got ahead and levied upon the debtor's assets. Thereupon the debtors assigned under the new, unconstructed insolvency statute, (see 33 Minn. 530) and the assignee demanded the said property. The plaintiffs plead fraud in the assignment. Succeeding upon that plea in the Federal court, they received the proceeds at the sale. A mere race for priority and that along wholly legal lines. The levying officer being held in trover, they paid the entire value of the property taken—then prayed to participate in the distribution, which this court allowed. They at no time demanded a penny over their admitted dues, nor did they decline any offer or opportunity of settlement nor refuse a proffered judgment. Marshall *vs.* Gilman (52 Minn. 97) merely holds that one, who by his delay or counter-election, has wholly lost a right to rescind a contract, by then vainly seeking to rescind, does not bar his remedy for damages for the fraud in procuring the contract. It is held as the reason, that there was no inconsistency between
166 the two proceedings—each was predicated upon the existence of the contract, and the fraud upon the plaintiff. The N. Y. case is practically identical as to this point, with the Marshall case.

Bank *vs.* Bank 57 Kan. 111, similar in most respects to the Van Norman case, differs in that the attachment was levied after the execution and delivery of the mortgage securing the Ill. bank's demand, it knowing of such delivery. Standing upon its claim that the mortgage was void, it obtained judgment on the trial, and thereby obtained the entire proceeds of the mortgaged property, excluding the other creditors secured by the mortgage. But on appeal this was reversed. Thereafter it sought its *pro rata* share, but was held bound by its waiver and election. The court held the case not to be within the exception covering suits for impossible remedies.

Also that the two remedies were inconsistent. This action was brought by the Emporia bank to foreclose the mortgage, making the Illinois bank and other levying creditors defendants. These two cases are not in conflict. In the former Lapp held a lien under his attachment. The subsequent assignment gave him no other lien, at least until he filed his claims. His only right thereunder was a potential one, as distributee conditional upon his filing a release. When he brought suit he had no election of rights or remedies. Under the insolvency statute the assignment cut out his lien. Thereupon his only rights were to take judgment on his claims or file it in the assignment proceeding. But these are entirely consistent. Hence, he never had an election of rights or remedies. His vain quest in seeking to enforce a non-existing lien never brought an opportunity to obtain any relief; nor at any stage could the court adjudicate upon his real right. But in the Kansas case, when the Illinois bank attached, the mortgage lien existed. That bank then had an election, viz: To take under the mortgage or resort to a legal seizure. But the mortgage being held valid, it was prior to the lien by levy, leaving nothing of value upon which that lien could operate. While the quest was as vain as that in *Re* Van Norman, yet the bank had elected and in the course of the litigation the court
167 could adjudicate upon the right and remedy last asserted. It is to be noticed that the election was made in the same suit in which it was adjudged to bar the relief last sought.

It was held upon the former appeal and is now *res adjudicata*, that the complaint is broad enough to warrant a foreclosure of the equitable mortgage thereunder. Therefore, it is also *res adjudicata* that respondent might, at the former trial, have demanded and obtained that relief. The court, on that trial, could have passed upon that right. Had defendants not appealed the judgment then entered would have barred such foreclosure. For the purpose of depriving appellants of a hearing upon their pivotal defense this court will not, by a judicial fiat, place them upon ground not only never taken in fact or intent but wholly foreign in substance, scope and object to that they did take and upon which only, on that appeal, they sought and obtained a decision.

Two classes of fact, embraced within the matter of election of remedies, give rise to two rules determining when such election becomes final and conclusive. In one class a new right springs into existence upon the initial act. A principal may either ratify or disaffirm the unauthorized contract of his agent. If the former he may hold the other contracting party under the contract. As to him the existence of the contract depends upon his election. Or a party may waive a tort and sue upon contract. Here, too, the contract arises by virtue of his election. In all cases of this class the opposite party is entitled to know at the outset upon which ground he is to be met. Hence the cases all agree in holding that the plaintiff elects and is bound thereby upon bringing an action upon either of the inconsistent theories. And that it matters not whether he recover or not. Certain critics of Nield *vs.* Burton, 49 Mich., 53 seem to have overlooked this distinction and ground. Being en-

titled to know at the outset in what relation he is to be held, the defendant rightfully treats the mere bringing of an action as a conclusive election to stand upon the ground therein set forth.

168 But in the other class of cases no new right arises. The party merely moves along one of two or more alternative lines of procedure based upon rights already existing or believed to exist. But that the differing rights and consequent remedies are inconsistent all could be followed, and no election could arise. It is only by following one that the other can be barred, and that upon principles, underlying the doctrine of *res adjudicata*. Every litigant is entitled to an opportunity to be heard upon his demand or defense and to present his asserted right of action or defense for consideration and determination by the court. But he can have but one "day in court." If, having the opportunity to present and be heard upon his entire claim or defense, he chooses to present but a portion of it, he is as fully bound by the decision as he otherwise could have been. He may not shift his cause of action, nor present his defenses piecemeal. In either case, at any time before final judgment he may petition for leave to amend so as to present his entire claim. But if he delay until the court has finally passed upon his contention he is forever bound. The judgment is *res judicata*. In this case respondent might at any time before the former judgment on appeal have dropped his claim upon the formal mortgages and have demanded and received appropriate relief upon the contract. In Jones *vs.* Burgess, Ala. 19 So. R. at p. 856 that court by Haraldson, J., says: "There is a recognized and well-established principle in the "administration of the doctrine of election of remedies, which seems "to prove beyond controversy that merely bringing a suit, without "pressing it to final judgment, cannot determine the right to an "election." Citing Leinkauff *vs.* Forcheimer 87 Ala. 258, 6, So. R. 149, the court says that in that case the claimant persisted in his suit and attachment unto judgment in the trial court and then to final decision on appeal—hence was justly held bound thereby.

In Bolton Mines Co. *vs.* Stokes 82 Md. 50, 33 At. R. 491 that court, citing its earlier decisions, says: "The law is adverse to multiply-"ing suits, and if a party has a choice between two actions upon the "same demand and he selects one which is finally decided by a "competent court, either for or against him, as a general rule

169 "he will not be permitted to resort to the other." "The ob-"vious principle which underlies this class of cases must "therefore be, that where a party has definitely selected his form of "action, and has pressed it to final decision and whether that judg-"ment be for or against him is wholly immaterial, he shall not be "at liberty to again vex the defendent. When the remedies are "alternative and not cumulative his choice of one and pursuant of "it to judgment will exclude the other, and having thus repudiated "the latter he cannot afterwards change his position and adopt the "remedy he had repudiated."

In White *vs.* White 68 Vt. 161, 34 At. R. 426 that court says: "And generally failure to obtain satisfaction by the remedy elected "gives no right to resort to the other."

In Ward *vs.* Green, 88 Tex. 177, 30 S. W. 864, Gray, the equitable owner of an undivided half of certain lands, having joined the owner of the other half (who held the title to all) in a mortgage, conveyed his interest to Ward, who, in the deed assumed and covenanted to pay half the mortgage debt. In an action wherein both mortgagors and Ward were defendants, but not counting on the above covenant, nor demanding any personal judgment against Ward, there was judgment of foreclosure, and against both mortgagors for any deficiency. Thereafter suit was brought to recover from Gray as mortgagor and Ward on his covenant, a large deficiency, the other mortgagee being insolvent and the former judgment against Gray void. Held barred by the former election and suit. See Main Brief p. 6. The court farther said: "Neither does "the invalidity of the personal judgment against Gray in the former "suit affect the question. It is not the judgment against Gray that "estopps the plaintiff, but the proceeding to foreclose against Ward." "Whether or not valid as against Gray the judgment proves the "election of remedies."

In Texas a deed reserving a lien for the price does not *pais title*. Upon default the vendor may elect between a suit for possession and one to for-close the lien. In Stone Cattle Co., *vs.* Boon 73 Tex. 170 551 (11 S. W. 547), it is held that before trial such vendor, by amendment may change from an action to foreclose the lien to one for possession.

In Hensley *vs.* Sheets 46 N. E. R. 94 it is held that by an election to press to final decision a bill or motion to review a judgment the right of appeal therefore is waived. The court says: "A party may "preclude himself from appeal by an election of remedies." See also Campbell *vs.* Wiggins 85 Tex. 451–22 S. W. 5. In Moore *vs.* Sanford, 151 Mass. 287 (24 N. E. 323) the plaintiffs had filed a petition under a statute of eminent domain for the damages sustained by a taking of their land. Such action inferentially admitted the validity of that statute. But before any hearing thereon they brought suit to declare the taking invalid in that the statute was unconstitutional. Held, not barred by the mere filing of that petition, the court, A. Devens, J., says the case is not within that class of cases wherein the mere "selection of one remedy necessarily implies that any other "remedy or any ground thereof is waived." But very strongly intimates that had the plaintiffs pressed their former proceeding to judgment they would have been bound by their election "for" says the court, "the plaintiff ought not to be allowed to experiment what "damages they might obtain before testing the constitutionality of "the act."

In Brunswick Co. *vs.* Dart 93 Ga. 747 (20 S. E. 613) held, Lumpkin, J. writing the opinion, that though the statute gives attorneys' fees as damages in specified actions, they cannot be allowed where the party has elected to sue in specific performance and has pressed such suit to final judgment. The reason for excepting cases where only an impossible remedy is sought from the general rule is that in such cases the party never had a "day in court" since therein it was not possible for the court to consider or determine his contro-

versy. In Strong *vs.* Strong 102 N. Y. 69, cited by respondent, that court states this as the reason for its decision—"The allegations and "proceedings show affirmatively that he" the surrogate before whom were the proceedings relied on to show an election, "had no author- "ity to pass upon the merits of the application." See other cases, my Main Brief p. 9. The party really took no position—pre-
171 sented nothing to the court—hence did not elect. A mere intent to elect is of no effect.

Hinchman *vs.* R'y Co. 14 Wash. 349, 44 P. R. 867, holds that where a vendor having sold property conditionally, the title not to pass until full payment, joins with other creditors in taking general security by mortgage covering that and other property, he cannot in an action wherein a foreclosure of that mortgage is sought also claim that portion of the property so sold as owner. He elected to waive and did waive his title as owner.

"A party who has the option of making his defense either at law "or in equity is bound by his choice though defeated." Carlyle *vs.* Long 5 Litt. (R'y) 168.

Suit, pressed to judgment, against an agent, knowing he was an agent and who was his principal, is an election not to sue the principal, though the judgment be worthless and the agent insolvent.

Fowler *vs.* Bank, 113 N. Y. 450 (21 N. E. 172).
Bigelow Estoppel (5*ed*) p. 124.

So too whatever the judgment against the agent.
2 L. R. A. p. 812 note.

Both in title and spirit, the rule of election of remedies applies where the selection was made in the same action in which occurs the later effort to resort to an alternative right or remedy. Inconsistency in the demand and the duty to present the actual demand relied upon—that a party is entitled to but one day in court in a single controversy underlie the rule. Bishop states it,—"Election "is the right of choice between two or more steps or things, by a "person not entitled to all; or it is the choice itself." Contracts sec. 781, also 6 Enc. Law (1st ed.) p. 247. Bigelow, thus "A party can- "not occupy inconsistent positions; and where one has had an elec- "tion between several inconsistent courses of action, he will be con- "fined to that which he first adopts." Estoppel (2nd ed. p. 503).

Pomeroy, "This doctrine involves the notion that no man
172 "can claim inconsistent rights with regard to the same sub- "ject." II Eq. Jur. sec. 395. (Is the basis of election under a will or deed, do. sec. 461 *et* S. E. G.) In 7 Enc. Pt. & Pr. 361—"Whenever the law supplies to a party two or more methods of re- "dress in a given case, based upon inconsistent theories, however "those methods may differ, either in the form or forum of procee- "dure—the party is put to his election and his choice of either is a "bar to the other."

It is the two, inconsistency, and opportunity, which determine. Both these apply as fully where all transpires in one proceeding as

though they had found expression in more than one. Bank of Enfala *vs.* Nat'l Bank of Illinois 57 Kan. 111, stated and cited from, *supra*, is precisely in point. Also Hildebrand *vs.* Tarbell, 73 N. W. 53. Also see Brunswick Co. *vs.* Dart, *supra*. In Hinchman *vs.* R'y Co. the election and waiver occurred in the bringing of the same suit in which it operated as a bar. Election is not, nor is it a result of *res judicata*. Ward *vs.* Green and Terry *vs.* Munger, *supra*. Respondent had his day in court, upon his chosen demand, wherein he might have recovered full relief, as fully as though the judgment on appeal had ordered the action dismissed upon the matter of pleading presented. His present quest is as essentially seeking his former discarded relief as though presented in a separate action.

The offer of judgment made at that trial by appellants was withdrawn prior to the submission of the case. P. B. p. 24. Respondent's counsel are in error in denying, in their affidavit, p. 9 P. B., such withdrawal. Therefore the offer, not being continual, neither authorized the subsequent attempt to obtain such judgment nor waived his election.

The two rights or liens were inconsistent—viz: (1.) In the lands covered. (2.) One a single lien, the other 4 distinct liens on different lands, all covering but a portion of those in the former. (3.) One a creature of equity, the others legal. (4.) A difference in amount of nearly $3,000. (5.) In rates of interest. (6.) In maturity.
173 (7.) The one did not the other did contain a power of sale.

The causes of action were as diverse as the liens. The remedies sought were alternative—not concurrent. In one, upon a single lien for a distinct amount, in the others upon four liens widely different in amount either severally or in the aggregate, each was exclusive of the other, and, carried into judgment, would bar the other. The only common feature, in any aspect, is in that, under the contract, a default thereon could operate a default in the mortgages. In his former brief p. 11, respondent plainly stated his position thus. "The only default that could occur would be a default in the pay- "ment of the monthly installments; and if upon such default there "should be a foreclosure it must not be for the optional payment of "$20,400 (which is not enforcible at all) but for the amount due "upon the notes and mortgages." Thus clearly repudiating the cause of action now insisted upon, while he now repudiates those then sued upon. He did not then in any manner state the facts and seeks only such relief as the court might hold him entitled to thereon—but stated his specific demand with the facts he claimed supported it—and to the end insisted upon that precise relief refusing any other. Even now he admits (p. 8, fo. 21 Present Brief) the remedies to have been alternative. He there says the contract "af- "fected all the mortgages in the same manner so that if by its oper- "ation they were merged the relief must be limited to a foreclosure "of the contract, for the amount specified therein, but if they were "not so merged the relief must be a foreclosure also of the original "mortgages for the larger amount secured by them." Since no admissible construction could make the contract merely a collateral se-

curity for but a part of the sums secured by the mortgages, I am at a loss to know the force of the above word "also."

But it is argued that respondent's asserted rights did not exist and that he but sought an impossible remedy. This argument wholly overlooks the facts: (1.) In his pursuit he might have recovered upon his real right. (2.) That he was offered a judgment which would have given him full relief, but refused it. In the Kansas Bank case *supra* the attachment was based upon the alleged
174 invalidity of the mortgage. Such basis wholly failing, the attaching creditor could not possibly obtain any relief thereby. Nevertheless in the suit to foreclose the mortgage he was afforded an opportunity to desist from his contest and receive the remedy he in fact was entitled to. Then, as here, succeeding in the trial court, he persisted in his baseless demand until judgment of reversal on appeal and although there as here the case was remanded for further proceedings, he was held bound by his election. He had had his full day in court and therein might have recovered full relief. His failure to obtain any relief was wholly due to his own act. Since this effect is the legal outcome of his intelligent choice and determination, he must be held to have intended such result. West *vs.* Platt 127 Mass. 372, 28 Enc. Law 528 note 4.

It matters not that respondent may have thought he would be able to assert his lien under the equitable mortgage in case he was finally defeated in his selected demand. In each case where a plaintiff splits his cause of action he does so intending thereafter to press the omitted portions of his demand. Nor does it matter to say he would have to give up the possible advantages of his elected right and remedy for this is equally the case in every case of election of remedies.

Having insisted upon his chosen demand until the entry of judgment on appeal, which is a final judgment upon that matter, respondent is now bound by his election. See cases cited, p. 6 Brief.

In Sullivan *vs.* Ross Estate 71 N. W. R. 634 plaintiff claimed a large balance due him on a logging contract. He knew the facts. He brought suit counting upon an oral contract which he plead controlled in the entire matter. He recovered a large judgment in the trial court, which upon appeal was reversed upon the ground that there was no oral contract in any manner affecting the matters in dispute, all of which were controlled by a written contract inconsistent with the averred oral agreement. Thereafter seeking to recover upon the written contract, he was held to be precluded by
175 his election and prosecution of his asserted claim under the oral contract. It must be noticed that at no time during the pendency of the first proceeding could the plaintiff have recovered any relief. Because of that fact upon reargument he was permitted to present his real claim, the chief justice however dissenting. Had he been offered, during the former proceeding—either a trial under the written contract or a judgment for all relief recoverable thereunder the final decision clearly would have held him bound by his election.

In Terry *vs.* Munger 121 N. Y. 161–24 N. E. R. 273, that court by

Peckham, J. says: "When it becomes necessary to choose between "inconsistent rights and remedies the election will be final and can- "not be reconsidered, even where no injury has been done by the "choice, or would result from setting it aside." This case also directly holds that the bar to the latter proceeding arises not by way of estoppel, but solely from the conclusive election.

The analogous rule of waiver also applies, "A mortgagee by com- "mencing and prosecuting an action upon the mortgage to secure a "conditional judgment for possession waives a previous entry to "foreclose."

Smith *vs.* Kelly 27 Me.
28 Ency. Law p. 558 note 3.

A mortgagee waives his mortgage rights by levying an attachment upon the mortgaged property.

Evans *vs.* Warren 122 Mass. 303.
28 Ency. Law, 555 and cases cited note 2.
Dyckman *vs.* Sevatson 39 Minn. 133.

A vendor in a conditional sale providing that title did not pass until payment of the purchase price waives his title and right to retake possession by reducing his demand for the price to judgment and levying attachment upon the property, even though the attachment was illegal.

Fuller *vs.* Eanes 108 Ala. 464, 19 So. R. 566.

Holding that though invalid, by the attachment the vendor
176 treated the property as that of the defendant "and sought "to subject it, in a manner wholly inconsistent with the re- "tention of title in himself." Citing many earlier cases.

Bishop defines waiver: "Waiver is where one in possession of any "right, whether conferred by law or contract, and of full knowledge "of the material facts, does or forbears the doing of something in- "consistent with the existence of the right or of his intention to "rely upon it; thereupon he is said to have waived it and he is pre- "cluded from claiming anything by reason of it afterward."

Bish. Contracts 87 Ed. sec. 792.

A consideration is requisite to support a waiver only where the waiver must operate, if at all, if creating a right—a contract. Here its only effect was to relinquish the right to foreclose the equitable mortgage and no consideration is necessary.

Dunn *vs.* Ward 63 Minn.

In Laird *vs.* Laird, Mich. 73 N. W. 382 a father, in consideration for his support, agreed to devise to his son all his property at death. He left a different will the son being one of the named executors, had the will allowed and filed a claim for the support. Held he waived the right to a specific performance of the agreement and elected the other procedure. The court cites and relies (in part) on Sullivan *vs.* Ross Estate 71 N. W. 634, *supra.*

It is not necessary to support a waiver by election of action that the action brought be one wherein some recovery can be had. In

Hildebrand *vs.* Tarbell, Wis. 73 N. W. 53; 57 a creditor, being one of the beneficiaries in certain transfers by way of security, having taken judgment on his demands execution whereon was returned unsatisfied, brought suit against another beneficiary to cut down the demands of the latter thereunder and to establish a *pro rata* interest in the transfers. Such action having been pending three years the plaintiff amended, changing his action to one to set those transfers aside as fraudulent. Being defeated he appealed.
177 The court held that had he first brought his action to set aside as fraudulent, he would have recovered but that he had waived that right by his election to take the other course. It also held that he had no right under the action as first brought and could not have recovered therein.

A pledgee or mortgagee waives his lien by refusing a tender of his demand.

Norton *vs.* Baxter, 41 Minn., 146.
Moore *vs.* Norman, 43 Minn., 428.
Cass *vs.* Higenbotam, 100 N. Y., 248.

This is important here. A mortgage was first a pledge. By refusing the tender, the pledgee insisted upon retaining the pledge—a wrong as to the pledgor. When a mortgage became merely a lien, the refusal still, though in less degree possibly, remained a wrong.

In Mitchell *vs.* Roberts 17 Fed. R. 780, Judge Caldwell observes: "This rule accords with justice and fair dealing. It would be a "great hardship on the debtor if the creditor had the right to refuse "to accept payment of the debt after it was due, and at the same "time retain the debtor's property or a lien on it for the debt. Ad- "vantageous sales would be prevented, collections delayed and credit "lost by the inability of the debtor to free his property. In many "cases debtors would be ruined before they could obtain relief by a "bill to redeem.—On the other hand, a creditor who refuses to re- "ceive payment of his debt cannot complain at the loss of his se- "curity for that debt, because it shall be accounted his own folly that "he refused the money when a lawful tender of it was made unto "him." Here no money was tendered. But the only relief the law recognized was offered. Claiming a large excess respondent tied the lands up by the judgment therefor. They could not be made available in any manner as means to obtain the money with which to pay the actual debt. The expense and delay of an appeal were imposed. It is farther to be noticed that from the inception of this litigation early in 1896 respondent has insisted upon judgment neither authorized by his contracts nor allowed by law, thus con-
178 stantly keeping all the lands tied up, thereby as well as through the onerous litigation preventing appellants from redeeming. Every reason supporting the rule of waiver just cited exists here and in stronger form. Not by his mere refusal (for that might at any time have been withdrawn) but by that coupled with his insistence to final judgment on appeal, he has waived the lien he now seeks to enforce.

III.

Respondent now seeks to support the exclusion of the supplementary answer and the proofs offered at the hearing upon the ground that they came too late. That appellants should have offered such answer at the former trial. He forgets that it could be no defense to the only demand he then pressed. He then expressly refused the judgment they offered and now seeks to cast the onus upon them in that they did not at once withdraw the offer and seek to defeat the proffered relief. But he did not object upon this ground to the filing of that answer. In the affidavit of his counsel, p. 9, P. B. (which, with my affidavit and the files, was all that was submitted to, or considered by, the court. P. B. fo. 25), he explicitly states his only objection, viz., that we were concluded by the former decision here. All was *res adjudicata*. Also, at the hearing below, he plainly stated the grounds of his objection to the offered proofs (P. B. fos. 60 to 63), not one whereof included the point now attempted to be raised. At fo. 63 he again stated his objection thus: "That the proposed supplementary answer did not set up facts constituting a defense and that the matters set forth therein were *res adjudicata*." Resting, then, upon these objections, he waived that he now seeks to interject and is estopped to raise it. But there is nothing in it. The matter of defense had no existence until the entry of judgment on appeal (August 15, 1898, P. B. p. 13). Besides, it did not appear prior to his service of the notice for amended findings and judgment, that respondent intended to claim such judgment, thereupon we promptly sought to serve the supplementary answer, and served the notice therefor, which, with the affidavit (fos. 3 and 6 to 18, P. B.) explicitly stated, the precise nature and time of origin of the de-
179 fense, and the reasons why it was not offered immdediately upon the remand no one whereof was questioned. Plainly the trial court considered itself bound by the former decision and mandate and passed upon no matter of objection not then raised by counsel.

The statute providing that "a defendant may be allowed on motion, to make a supplementary answer, etc.," (sec. 5270 St. 1894) is imperative. "When the party offering to serve and file such "supplementary pleading makes the proper showing, and is guilty "of no unreasonable laches, it is not a discretionary matter, but it is "the duty of the court to allow it." Mansten *vs.* Berryhill 63 Minn. 1, 65 N. W. 89. Voak *vs.* Investment Co. 51 Minn. 455.

The matters alleged in sec. 3, supplementary answer, are material to show that, when he made his election, he knew not only every fact, but even the principles and application of the law, pertinent thereto. Sec. 3, though in form a conclusion of law, yet, connected with the preceding averments of fact, plainly apprised the plaintiff of the precise nature of the defense relied upon and of the grounds thereof. Sec. 4 is a formal averment of claim under the Federal Constitution and a protest against the attempted arbitrary taking of the lands while refusing a hearing—a taking without due process of law.

This rejected answer and record evidence further show the facts touching this litigation, viz: Respondent first verified his complaint alleging himself to be the owner of all the land in the contract under the deed to him therein described—demanding instant possession of all thereof with large damages for its retention. The court held the deed and contract to amount to an equitable mortgage. Thereupon he sought to file an amended complaint, also verified by himself, alleging respondent to be its owner but that they wrongfully withheld its possession from him and praying for a sale thereof without right of redemption (P. B. p. 38). Failing in that attempt he procured a dismissal of that action without costs and instituted the present suit with its demand for $3,000 over the entire
180 amount owing to him, and thereon forced defendant to an appeal to this court in order to be relieved from the wrongful judgment therefor. Being there again thwarted, he plays still another sleeve card thereby debarring appellants from any hearing and from all right to be heard, thus driving them either to unconditional surrender or to a second appeal, and now he seeks the establishment of his gag law in this court. I submit these facts only to clearly show a dominant purpose, operative throughout this entire litigation, far removed from the desire to obtain his rights, legal or moral.

Appellants ask no final judgment here but only that there may be a fair and open trial as to the existence and effect of the matters alleged in defense.

We therefore pray the reversal of the judgment appealed from the vacation of the sale thereunder, with directions to the trial court to permit the service and filing of the supplementary answer. All which is respectfully submitted.

181 11859.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1899.

DANIEL S. PIPER, Respondent,
vs.
JOSEPH A. SAWYER ET AL., Defendants; JOSEPH A. Sawyer and Nellie A. Sawyer, Appellants. } No. 124. Opinion.

This is the second appeal in this case. See 73 Minn. 332, 76 N. W. 57. The facts, about which there is no controversy, are fully and clearly set out in the opinion on the former appeal, and need not be repeated at length here. To a proper understanding of this opinion the principal facts only need be stated.

At a date long prior to the commencement of this action, the plaintiff became the owner of four certain mortgages executed by defendants Sawyer and wife upon real property owned by them, and, to adjust the amount due thereon, and provide for the payment thereof, entered into an agreement with defendants in which the sum of $20,400 was fixed as the total amount due. Terms of pay-

ment thereof were agreed upon, and it was also agreed that defendants should convey the property to plaintiff, and plaintiff should in turn reconvey to defendant Mrs. Sawyer; the deed to her to be delivered to and held by defendant Woodman until Sawyer and wife should pay such indebtedness. The deeds were duly executed and delivered accordingly. Defendants failed to pay the indebt-
182 edness at the time and as required by the terms of the agreement, and plaintiff, acting on the theory that the new agreement operated only as a modification of the contract between the parties as made up by the mortgages, and that they were not merged therein, brought this action, and asked for the foreclosure of the four mortgages. The court below on the first trial held in harmony with this theory, and ordered judgment of foreclosure as to the four mortgages, from which judgment the former appeal was taken. It was held by this court on that appeal that this special agreement constituted an equitable mortgage, in which the four prior mortgages became merged. The judgment was reversed, and the cause remanded, with directions to the court below to amend its findings of fact and conclusions of law, ascertain the amount due on the equitable mortgage, and direct its foreclosure. The court below complied with this mandate, and defendants again appeal.

At the time of plaintiff's application to the court below for the amended findings, the defendants applied for leave to file a supplemental answer, setting up as a defense—to state it in substance and briefly—that, because plaintiff had brought his action to foreclose the original mortgages, and had refused defendants' offer to allow judgment of foreclosure as to the equitable mortgage, his remedy under the latter became lost, and he thereby estopped himself from asserting any rights thereunder. The court below denied this application, and this refusal is assigned as error. Although there are nine separate assignments of error, they all go to this one question. All the facts with reference to the four mortgages and the equitable mortgage are stated in the complaint, and are undisputed.

The identical question presented by the proposed supplemental answer was presented and argued to this court on the former appeal, and decided adversely to appellants, and is, therefore, *res*
183 *adjudicata*. That decision became the law of the case, and the question cannot be reconsidered on this appeal. Johnson *v.* N. W. Telephone Ex. Co., 54 Minn. 37, 55 N. W., 829. And, besides, the cause was remanded to the district court on the former appeal with directions to award judgment of foreclosure as to the equitable mortgage, and that court had no alternative but to comply with that mandate. "Where a judgment is reversed and remanded with specific directions, the court below has no discretion in the premises, but must pursue the mandate of the appellate court." 13 Enc. Pl. & Pr., 846. For these reasons the judgment appealed from must be affirmed.

But we may remark, in passing, that the facts set up in the proposed answer do not constitute a defense, and, conceding authority in the court below to permit it to be interposed, the order rejecting it was proper for that reason. The doctrine of election of remedies

has no application to the facts of this case. Plaintiff did not possess two inconsistent remedies for the enforcement of his rights. He possessed an incumbrance against defendants' property to the amount of $20,400 or more, with but one remedy to enforce the security, which was by foreclosure of the incumbrance, whether evidenced by the original mortgages or by the substituted equitable mortgage. He did not waive his rights under the equitable mortgage by asking in his complaint—which set out all the facts, both with the reference to the original and equitable mortgage—that the original mortgages be foreclosed. The plaintiff asked for the wrong relief but the court was not precluded from granting him his proper relief. G. S. 1894, § 5413.

Judgment affirmed.

184 [Endorsed:] No. 11859. State of Minnesota, supreme court. Daniel S. Piper, respondent *vs.* Joseph A. Sawyer *et al.* defendants Joseph A. Sawyer *et al.* appellants. Opinion and syllabus filed November 29 1899. D. F. Reese, clerk.

185 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1899.

DANIEL S. PIPER, Respondent,
vs.
JOSEPH A. SAWYER ET AL., Defendants, JOSEPH A. SAWYER and NELLIE A. SAWYER, Appellants. } No. 124.

Pursuant to an order of court duly made and entered in this cause, on the fifteenth day of December A. D. 1899.

It is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to wit, of the district court of the fifth judicial district, sitting within and for the county of Steele, be and the same hereby is in all things affirmed and it is further determined and adjudged that the respondent above named, do have and recover of said Joseph A. Sawyer and Nellie A. Sawyer, appellants herein the sum and amount of seventy-one and $\frac{40}{100}$ dollars ($71.40) costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this fifteenth day of December A. D. 1899.

By the court.

Attest: D. F. REESE, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25.00
Clerk's fees, for making return	22.15
Printer's fees	14.00
Clerk's fees, supreme court	10.00
Filing mandate	
Affidavits and acknowledgments	.25
Postage	
	$71.40

186 STATE OF MINNESOTA, } ss:
Supreme Court, }

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and seal of said supreme court at the capitol, in the city of St. Paul, this fifteenth day of December A. D. 1899.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE, *Clerk.*

[Endorsed:] 11859. State of Minnesota, supreme court Transcript of judgment. Filed December 15, A. D. 1899. D. F. Reese, clerk.

187 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1899.

DANIEL S. PIPER, Respondent,
vs.
Jos. A. SAWYER ET AL., Defendants;
Jos. A. Sawyer and Nellie A. Sawyer, Appellants.

No. 124. Appeal from District Court, Fifth Judicial District, County of Steele.

This cause having been duly argued and submitted at the general October term of this court, A. D. 1899, upon the return to the appeal herein.

Now after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below, herein appealed from, be and the same hereby is, in all things affirmed and that the respondent above named have judgment accordingly.

Entered December 15 A. D. 1899.

By the court.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest: D. F. REESE, *Clerk.*

188 [Endorsed:] No. 11859. State of Minnesota, supreme court. Copy of order for judgment. Filed December 15 A. D. 1899. D. F. Reese, clerk. Entered on page —.

189 STATE OF MINNESOTA:

Supreme Court, General October Term, A. D. 1899.

THURSDAY MORNING, 9.30 O'CLOCK,
November 23, *A. D.* 1899.

Court convened pursuant to adjournment. All the justices being present.

DANIEL S. PIPER, Respondent,
vs.
Jos. A. SAWYER ET AL., Appellants. } Cal. No., 124; Reg. No., 11859.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision, and taken under advisement.

A true record

[Seal of the Supreme Court. State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest: D. F. REESE, *Clerk.*

190 [Endorsed:] 11859. State of Minnesota, supreme court. Copy of minutes of argument. Filed December 15 A. D. 1899 D. F. Reese clerk.

191 [Endorsed:] No. 11859. State of Minnesota, supreme court. Daniel S. Piper respondent against Jos. A. Sawyer *et al.*, appellants. Judgment-roll. Filed December 15 1899 D. F. Reese clerk.

192 STATE OF MINNESOTA, } ss:
Supreme Court, }

DANIEL S. PIPER, Plaintiff and Respondent,
vs.
JOSEPH A. SAWYER, NELLIE A. SAWYER, and L. C. WOODMAN, Defendants; Joseph A. Sawyer and Nellie A. Sawyer, Appellants.

Petition for a Writ of Error.

To the Honorable Charles M. Start, chief justice of the supreme court of the State of Minnesota:

Now come the above-named Joseph A. Sawyer and Nellie A. Sawyer, by their attorney, J. A. Sawyer, and complain that in the records and proceedings and also in the rendition of the judgment in a suit between Daniel S. Piper, plaintiff and Joseph A. Sawyer and Nellie A. Sawyer and L. C. Woodman, defendants and appellants in the supreme court of said State of Minnesota, (said court being the highest court in law or equity in said State of Minnesota in which a decree could be had in said cause,), notwithstanding it

was contended and asserted by said defendants that the orders and judgment of the trial court in said cause, from which said judgment the appeal in said suit to said supreme court of the State of Minnesota, was taken and was then and there pending, had, and did prevent these plaintiffs in error, who then were and now are citizens of the United States of America, and of said State of Minnesota, from interposing and from having considered and determined by said court, their defense to and in said suit, and that said trial court had in said suit refuse- to said plaintiffs in error all opportunity to be heard upon their said defense, and did deprive these plaintiffs in error of their lands and property without due process of law, and did refuse to them the equal protection of the laws, and that said judgment of said supreme court of Minnesota did deny to, and refuse these plaintiffs in error any and all hearing, and all opportunity to be heard, in said suit or otherwise, upon their said defense, and did prevent them from *from* presenting the same for the consideration and determination of said supreme court of Minnesota, and did deprive them of their lands and property without due process of law, and did refuse to them the equal protection of the laws, contrary to the provisions of sec. 1 of art. XIV of the amendments to the Constitution of the United States of America
193 and that said judgment operated as such violation, and was and is in direct contravention, and in direct and neccessary violation of said sec. 1 of art. XIV of the amendments to the Constistution of the United States, yet and notwithstanding their said contention, a final judgment was in said suit entered and rendered against said defendants, these plaintiffs in error, in said supreme court of Minnesota, on the 15th day of December A. D. 1899, wherein it was adjudged that the decision of said supreme court of Minnesota in said cause upon a former appeal therein taken by these plaintiffs in error, and wherein the judgment of said trial court in said cause foreclosing each of the four formal mortgages set forth in the complaint therein, and adjudging that the equitable mortgage set up in said complaint and the contract and deeds evidencing said equitable mortgage were *functus officio* and of no force, was reversed and said suit remanded—that said judgment was *res adjudicata* as to these plaintiffs in error and prevented them from setting up or presenting their said defense, viz.—that by insist*t*ing upon a foreclosure of said formal mortgages and insisting upon the rendering and entry therein of a judgment that said contract and deeds and the equitable mortgage evidenced thereby were terminated and of no force, upon a complaint praying solely for that relief, and by expressly, and in open court at the trial below of said cause, refusing to accept the offer of judgment *t*hen, in open court, made by said defendants to said plaintiff of immediate and unopposed entry of judgment therein foreclosing said equitable mortgage for the sum then due and unpaid, principal and interest, thereon, and by adhering and d*me*anding said judgment of foreclosure of said four formal mortgages and for the entire sum, principal and interest and attorneys' fees therein specified, said sum being greater by more tha*t* two thousand dollars than the amount due upon said equitable

mortgage, and by demanding in said supreme court of Minnesota that said judgment of foreclosure of all said formal mortgages with all said excessive sums and amounts, and by insisting upon said remedy only and repudiating all other and different relief until after final judgment in said supreme court of Minnesota reversing said judgment and determining that each and all of said four formal mortgages were anf had been merged in said equitable mortgage when said contract was entered into and were no *no* longer of any force or effect, the said plaintiff, this defendant in error had conclusively elected his remedy and cause of action and had there-
194 by estopped himself from asserting, in direct contradiction to his said election of remedies, and in contravention thereof, that said formal mortgages were extinct and said equitable mortgage in full life and force. And it was further held, adjudged and decreed in and by said judgment of said supreme court of Minnesota, so entered in said suit on said 15th day of December A. D. 1899 that the orders and judgment of said trial court in said suit, made after the first remand thereof, refusing to allow said defendants to plead their said defense therein, and refusing to allow them to present any evidence in support thereof, and in refusing to allow any trial whatever in said cause after said remand thereof, and in making and filing therein further findings of fact therein without taking any evidence therein, and thereby refusing to allow said defendants to present or be heard upon their said defense therein, and in wholly refusing in any manner to consider said defense or to pass upon its validity in any manner whatsoever, did not operate in any manner to deprive said defendants of any right secured to them by said XIVth amendment and did not deprive them of their property without due process of law and did not deny to them the equal protection of the laws. And it was further determined, decided and directed in and by the said judgment of Dec. 15th 1899 in said supreme court that said judgment, so entered upon said denial to said defendants of all heraing upon their said defense was a valid judgment, and that the same should be promptly enforced and that the sale of all said lands of said defendants thereunder was a valid sale, transferring to said plaintiff, Daniel S. Piper, who was the purchaser thereat, the full legal title to all said lands, and that said sale and the expiration of redemption therefrom did and would pass to said Piper the full title to all lands and the right to the immediate possession of all thereof, and that thereby said defendants were not deprived of any rights under said XIVth amendment and were not deprived of any property save only by due process of law. All of which fully appears on the face of the records, pleadings, assignments of error, briefs, proceedings of said supreme court in said cause, and is contrary to art. XIV of the amendments to the Constitution of the United States.

Wherefore said Joseph A. Sawyer and Nellie A. Sawyer, appellants aforesaid, pray for the allowance of a writ of error, and for such other process as mau cuase the said decision of said su-
195 preme court of Minnesota to be reviewed and corrected by the Supreme Court of the United States.

Dated at St. Paul, Minnesota, this 30th day of November A. D. 1901.

J. A. SAWYER,
Attorney for Defendants, Owatonna, Minnesota.

STATE OF MINNESOTA, *Supreme Court,* } ss:

On reading and filing the above petition for a writ of error to the Supreme Court of the United States, and on motion of J. A. Sawyer Esq. of counsel for said defendants and petitioners in error, it is ordered: That the said petition be, and the same is hereby granted, and that a writ of error issue forthwith as prayed for in said petition.

Dated at St. Paul, Minnesota, this 30th day of November, A. D. 1901.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

196 [Endorsed:] Petition for a writ of error.

197 *Bond in the Supreme Court of the United States of America.*

JOSEPH A. SAWYER and NELLIE A. SAWYER, Plaintiffs in Error,
against
DANIEL S. PIPER, Defendant in Error.

Know all men by these presents, that we, Joseph A. Sawyer and Nellie A. Sawyer, plaintiffs in error, as principals, and Laurence C. Woodman and M. H. Abbott, Fred L. Davies and N. T. Davies as sureties, all being citizens and freeholders of and in the counties of Steele and Freeborn and State of Minnesota, are held and firmly bound unto Daniel S. Piper, the respondent above named, his heirs, executors, administrators and assigns, in the full sum and amount of five hundred dollars ($500.00), to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Sealed with our seals and dated on this 27th day of November A. D. 1901.

Whereas lately, at a session of the supreme court of the State of Minnesota, in a suit pending in said court between said Daniel S. Piper as plaintiff and said Joseph A. Sawyer and Nellie A. Sawyer, as defendants, a fi*b*al judgment was rendered against said defendants, and the said defendants obtained a writ of error from the Supreme Court of the United States and filed a copy thereof in the clerk's office of said court, to reverse said judgment in the aforesaid suit, and a citation to said Daniel S. Piper citing and admonishing him to be and appear before the Supreme Court of the United States at a term thereof to be begun and holden at Washington D. C. on Monday the 30th day of December A. D. 1901: Now the condition of the above bond is such, with the obligation therein contained, that if the said Joseph A. Sawyer and Nellie A. Sawyer shall prose-

cute their said writ of error and answer all costs and damages and fully pay to said Daniel S. Piper his heirs, executors, administrators and assigns the full amount of such costs herein as may be hereafter entered against them, if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

JOSEPH A. SAWYER. [SEAL.]
NELLIE A. SAWYER. [SEAL.]
L. C. WOODMAN. [SEAL.]
M. H. ABBOTT. [SEAL.]
FRED L. DAVIES. [SEAL.]
N. T. DAVIES. [SEAL.]

In presence of
A. L. SPERRY,
PARK SAWYER,
As to Joseph A. Sawyer.
" Nellie A. Sawyer.
" M. H. Abbott.
" L. C. Woodman.

C. S. SWENSON,
PAUL BEAN,
As to Fred L. Davies.
" N. T. Davies.

198 STATE OF MINNESOTA, } ss:
County of Steele, }

On this 29th day of November A. D. 1901, before me, a notary public in and for said Steele county, personally appeared the above-named Joseph A. Sawyer, and Nellie A. Sawyer, and Laurence C. Woodman and M. H. Abbott to me well and personally known to be the same persons described in and who executed the above and foregoing instrument and bond, and they each acknowledged the execution thereof to be their free act and deed.

A. L. SPERRY,
Notary Public, Steele County, Minnesota.

[Notarial Seal, Steele Co., Minn.]

STATE OF MINNESOTA, } ss:
County of Steele, }

On this 29th day of November A. D. 1901, before me, a notary public in and for said Steele county, personally appeared Laurence C. Woodman, to me known to be the surities upon the above bond, who, *each* being duly sworn, did say that he is one of such sureties, and is a resident and freeholder in said Steele county and worth the sum of five hundred dollars above all debts and liabilities and exclusive of his exemptions, and *each thereof* did say that he is worth more than five times the amount of said bond over and above all debts, liabilities and all exemptions.

L. C. WOODMAN.

Subscribed and sworn to before me this 29th day of November, A. D. 1901.

A. L. SPERRY,
Notary Public, Steele County, Minn.

[Notarial Seal, Steele County, Minn.]

199 STATE OF MINNESOTA, } ss:
County of Steele, }

On this 29th day of November A. D. 1901 personally appeared M. H. Abbott who being first by me duly sworn did say that she is a resident of said Steele county and is worth the sum of five hundred dollars over and above all debts and exclusive of all property exempt from execution, and that she is one of the sureties within named.

(Signed) M. H. ABBOTT.

Subscribed and sworn to before me this 29th day of November A. D. 1901.

A. L. SPERRY,
Notary Public, Steele County, Minn.

[Notarial Seal, Steele County, Minn.]

STATE OF MINNESOTA, } ss:
County of Freeborn, }

On this 29th day of November A. D. 1901, before me, a notary public in and for said county, personally appeared Fred L. Davies & N. T. Davies to me personally known to be the same persons described in, and who executed the within bond as sureties and acknowledged the execution thereof to be their free act and deed.

C. S. SWENSON,
Notary Public, Freeborn County, Minnesota.

[Notarial Seal, Freeborn County, Minn.]

STATE OF MINNESOTA, } ss:
County of Freeborn, }

Fred L. Davies and N. T. Davies each being first duly sworn did say that they are sureties on the within bond and worth the sum of five hundred dollars, specified in the within bond, over and above all debts and liabilities and exclusive of all property exempt from execution and that each is worth more that fourfold said sum, exclusive of all debts and exemptions, and that they are residents and freeholders in the county of Freeborn in said State of Minnesota.

(Signed) FRED L. DAVIES.
N. T. DAVIES.

Subscribed and sworn to before me on this 29th day of November A. D. 1901.

C. S. SWENSON,
Notary Public, Freeborn County, Minnesota.

[Notarial Seal, Freeborn County, Minn.]

200 [Endorsed:] State of Minnesota Supreme Court of the United States —judicial district. Joseph A. Sawyer & *W.* A. Sawyer, plaintiffs in error, *vs.* Daniel S. Piper, defendant in error. Copy of bond. I hereby approve of this bond and the sureties therein named. Chas. M. Start, chief justice. Dated Nov. 30, 1901. J. A. Sawyer, attorney for plaintiffs in error, Owatonna, Minn.

201 In the Supreme Court of the United States, *ss:*

JOSEPH A. SAWYER and NELLIE A. SAWYER, Plaintiffs in Error,
against
DANIEL S. PIPER, Defendant in Error.

Assignment of Errors.

(1.)

It was error in the trial court, to refuse leave to file the supplementary answer prayed for by plaintiffs in error, and error in the State supreme court to affirm the judgment entered in said cause upon said refusal by said trial court.

(2.)

It was error in the trial court to reject the evidence offered by plaintiffs in error to substantiat*e* their said defense in said cause, and error in said State supreme court to affirm the judgment based upon such refusal.

(3.)

It was error in said trial court to refuse the demand for a trial, made therein by plaintiffs in error, and to order judgment against them upon amended findings made solely upon the evidence submitted at the former trial, when the defense asserted after the remand, did not exist and was not pleaded nor offered to be proven, and error in said State supreme court to affirm the judgment so entered.

(4.)

It was error in said State supreme court to hold plaintiffs in error bound by the former judgment therein upon the first appeal, *res adjudicata.*

(5.)

It was error in said State supreme court to remand said cause upon said former appeal with directions to the trial court to amend its findings of fact, upon the evidence submitted at the former trial, and thereon to order judgment in favor of this defendant in error for the foreclosure of the equitable mortgage.

(6.)

It was error in said State supreme court to hold these plaintiffs in error bound by such directions in said decision upon said former

appeal and to refuse to allow them to be heard upon, and in refusing to consider their said defense based upon the controlling election by defendant in error to rely solely upon his formal mortgages, and to hold the contract and deeds of no force, such election
202 having been persisted in and relied upon until after the entry of final judgment in said State supreme court holding that said formal mortgages were of no force and that no liens upon the lands and premises involved existed under them.

(7.)

It was error to hold plaintiffs in error and the court bound by said former decision as the law of the case.

(8.)

After deciding that said former decision was the law of the case, and that both the court and the parties were bound thereby, — error to proceed to consider or determine as to the validity of said defense, the court being, under its decision therein, without jurisdiction so to do.

(9.)

It was error in said State supreme court to hold that said proceedings constituted due process of law, as required by sec. 1, of art. XIV of the amendments to the Constitution of the United States, and error to hold therein that thereby plaintiffs in error were not deprived of their property without due process of law.

(10.)

It was error to hold that in said proceedings these plaintiffs in error were not denied the equal protection of the laws.

(11.)

It was error to refuse to plaintiffs in error their right to be heard upon, and to present their defense predicated upon the former election made in said cause by the defendant in error to claim solely under the formal mortgages, such election having been by him persisted in after the offer to him made in open court at the trial in said cause that judgment might be therein entered without contest for the foreclosure of the equitable mortgage and for the entire amount then secured thereby, which offer was expressly refused by defendant in error, his said election having also been persisted in until after the final judgment upon appeal holding said formal mortgages void, and of no effect.

Dated November 29th 1901.

____ ____,

Attorney for Plaintiffs in Error,
Owatonna, Minnesota.

203 [Endorsed:] Assignments of error.

204 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said the supreme court of the State of Minnesota, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Daniel S. Piper, plaintiff and defendant in error, and Joseph A. Sawyer and Nellie A. Sawyer, defendants and plaintiffs in error, wherein was drawn in question the validity of an authority exercised under the United States, and the decision was against the validity of the claim and authority so therein set up and asserted, and wherein was drawn in question the validity of an authority, exercised under a statute and law of said State of Minnesota on the ground that said authority, and the judgment of said supreme court of Minnesota predicated thereon, was repugnant to the Constitution of the United States, and wherein the decision was in favor of such their validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the right, claim and privilege specially set up and claimed under and by virtue of said Constitution of the United States and said clause thereof, a manifest error hath happened to the great *danger* of the said Joseph A. Sawyer and Nellie A. Sawyer, as by their complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court at Washington, on the 30th day of December A. D. 1901 in the said Supreme Court to be then and there held: that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and Constitution of the United States, and the customs thereof, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice
205 of the said Supreme Court of the United States, this 30th day of November in the year of our Lord one thousand nine hundred and one.

HENRY D. LANG,
Clerk of U. S. Circuit Court for the District of Minnesota.

Allowed by the Hon. Charles M. Start chief justice supreme court of the State of Minnesota.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

206 [Endorsed:] Writ of error.

207 THE UNITED STATES OF AMERICA, *ss:*

In the Supreme Court.

JOSEPH A. SAWYER and NELLIE A. SAWYER, Plaintiffs in Error,
vs.
DANIEL S. PIPER, Defendant in Error.

THE UNITED STATES OF AMERICA, *ss:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein the said Joseph A. Sawyer and Nellie A. Sawyer are plaintiffs in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as is in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the city of St. Paul in the State of Minnesota, this 30th day of November, A. D. 1901.

CHAS. M. START,
Chief Justice of the State of Minnesota.

Service of the foregoing citation by copy and the exhibition to us of the original signature of Charles M. Start, chief justice of the State of Minnesota, appended to the original thereof, was made at the city of Owatonna, Minnesota, on this — day of December, A. D. 1901, and is hereby admitted.

——— ———,
——— ———,
Attorneys for Daniel S. Piper, said Respondent in Error.

208 STATE OF MINNESOTA, *Supreme Court,* } *ss:*

On this — day of December, A. D. 1901, before me, the deputy, and acting, clerk of said supreme court, personally came J. A. Sawyer, to me known to be the attorney for the plaintiffs in error therein mentioned, who being by me first duly sworn, did say that on the second (2nd) day of December, A. D. 1901, at the city of Owatonna in the county of Steele and State of Minnesota, and in the office of Messrs. Wheelock & Sperry therein, he personally delivered to and left with said Wheelock & Sperry a true copy of the hereunto-attached original citation, and at said time and place exhibited to said Wheelock & Sperry said original citation and the genuine signature of Hon. Charles M. Start, chief justice of the supreme court of said State of Minnesota, thereto attached. Affiant further says that he personally knows that said Wheelock & Sperry, (with Robert Taylor, below mentioned,) have been at all times, and still are the attorneys of the within-named Daniel S. Piper, defendant in error in said cause, and that said Wheelock — Sperry are still and

now the attorneys of said Piper in other matters. Affiant further states that at said time and place he also delivered to and left with said Wheelock & Sperry a true copy of his assignments of error in said cause, and left with them that they might copy the same—a duly attested copy of the writ of error herein: And that at said office and on the 5th day of December 1901 he personally exhibited to Robert Taylor, one of the attorneys of this defendant in error, said original citation and the said signature of Hon. Charles M. Start thereto affixed.

(Signed) J. A. SAWYER.

STATE OF MINNESOTA, }
Supreme Court. }

Subscribed and sworn to before me on this — of December A. D. 1901.

[Seal of the Supreme Court, State of Minnesota.]

J. L. HELM,
Deputy Clerk Supreme Court, Minnesota.

209 [Endorsed:] Original. State of Minnesota. Supreme Court of the United States. Joseph A. Sawyer *et al.* plaintiffs in error *vs.* Daniel S. Piper defendant in error. Citation. J. A. Sawyer, attorney for pl'ffs in error, Owatonna, Minn.

210 STATE OF MINNESOTA, } *ss:*
Supreme Court, }

JOSEPH A. SAWYER and NELLIE A. SAWYER, Plaintiffs in Error and Appellants,
vs.
DANIEL S. PIPER, Defendant in Error.

I hereby certify that upon the argument in the above-entitled cause in this court the above-named appellants, by their attorneys, in support of their assignments of error in this court, numbered 8 and 9, — viz: That the court erred in depriving said appellants of their property without due process of law, and erred in denying to those appellants the equal protection of the laws, relied upon, and claimed the protection of sec. 1 of article 14, of the amendments to the Constitution of the United States, and that upon such argument appellants drew in question the said section, and claimed a deprivation of their property and lands involved in said action, contrary to the provisions of that section of said amendment to the United States Constitution.

Dated at the capitol in St. Paul, Minnesota, this 22d day of December, A. D. 1901.

CHAS. H. START,
Chief Justice Supreme Court of the State of Minnesota.

211 STATE OF MINNESOTA:

Supreme Court.

STATE OF MINNESOTA, } ss:
Office of Clerk of Supreme Court, }

I, Darius F. Reese, clerk of the supreme court of the State of Minnesota, do hereby certify and return to the Supreme Court of the United States, that the foregoing and annexed transcript of record is a full and complete transcript of the record, judgment, judgment-roll and all of the proceedings had in the said supreme court of the State of Minnesota in the case between Joseph A. Sawyer and Nellie A. Sawyer, appellants and plaintiffs in error, against Daniel S. Piper, respondent and defendant in error, including the opinion of the said supreme court therein, and also contains a full and complete transcript of the record, judgment, judgment-roll and all the proceedings had in said supreme court upon the former appeal in said cause, save only the copies of the four original mortgages, mortgage notes and assignments as set out *in extenso*, in the settled case therein; and also contains a full and correct transcript of all the briefs, original and reply, filed therein by these plaintiffs in error, including all their several assignments of error upon each appeal as appears from the original files and records of said supreme court of the State of Minnesota.

And I do further certify and return that I have annexed to said transcript and included therewith a copy of the petition for writ of error, and of the bond on the writ of error, and approval thereof, and the assignments of error as the same remain on file and of record in said supreme court of the State of Minnesota, and the original writ of error from the Supreme Court of the United States and the original citation issued thereon, with admission of service thereof, and the original certificate of the chief justice that upon the oral argument there was drawn in question the validity of the former decree of this court upon the ground that the same violated the rights of the plaintiffs in error under the provisions of sec. 1 of art. 15 of the amendments to the Constitution of the United States and that
212 the same constitutes a true and complete return to said writ of error.

In witness whereof, I have hereunto set my hand and seal of said supreme court of the State of Minnesota at the capitol, at St. Paul, Minnesota this 23d day of December A. D. 1901.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE,
Clerk of the Supreme Court of the State of Minnesota,
By J. L. HELM,
Deputy Clerk.

213 [Endorsed:] State of Minnesota, supreme court. Joseph A. Sawyer and Nellie A. Sawyer plaintiffs in error *vs.* Daniel S. Piper defendant in error.

Endorsed on cover: File No. 18374. Minnesota supreme court. Term No. 225. Joseph A. Sawyer and Nellie A. Sawyer, plaintiffs in error, *vs.* Daniel S. Piper. Filed January 16", 1902.

Supreme Court of the United States.

October Term, 1902.

No. 225.

JOSEPH A. SAWYER and NELLIE A. SAWYER,
Plaintiffs in Error,

Against

DANIEL S. PIPER.

BRIEF BY PLAINTIFFS IN ERROR.

[Figures in parentheses refer to folios in the printed record.]

Writ of Error from final Judgment of the Supreme Court of Minnesota. This judgment affirmed a foreclosure Judgment of the trial court upon the sole ground that plaintiffs in error were in all matters therein concluded by a former judgment on appeal in the State Supreme Court in the same cause. The other possible ground appearing in the opinion is of no import here, since for many years before and since this decision was made it has been the settled law of the State of Minnesota that both the Supreme and trial courts are as much bound by a decision upon an earlier appeal in a cause as are the parties,

and that neither court upon a later appeal has *Jurisdiction* to reverse or modify a point so decided.

Bradley vs. Norris 67 Minn. 48
Tilleny vs. Wolverton 54 Minn. 75

The ground of this writ of error is that by such judgment plaintiffs in error are deprived of their property without due process of law in that they were not allowed to be heard upon any defense to the demand recovered upon, denied all opportunity to be heard in the cause, and of their "day in court."

Plaintiffs in error, being the owners and in possession of a highly improved farm of about 800 acres located near the City of Owatonna, Minnesota, the several tracts of which were covered by separate mortgages some of which were held by respondent, in February, 1895, plaintiffs in error entered into an agreement "Exhibit 'E" with respondent, and as a part of such agreement, also executed and delivered to him a deed of warranty conveying the entire premises (9 to 11 and 22, 23). The brief terms of this contract are that respondent should buy in all the old or formal mortgages, that the total sum due him therefor was to be $20,400.00, for which plaintiffs were to pay him $100.00 per month continuously, (to be lessened in proportion to any payments upon the principal), and whenever, these monthly payments being kept up, they should have paid him the $20,400, then a deed executed by respondent to plaintiffs in error for the premises, and deposited in

escrow as a part of the original transaction, (10 and 24-25) was to be delivered to said grantees.

Default having been made in keeping up the monthly payments, respondent first sued in ejectment pleading this contract and deed to him as the basis of his title and right to possession, (15 to 17 and 115 to 122). Being defeated here the present action was brought, the complaint being indefinite as to the cause of action intended to be relied upon. By reason of higher rates of interest, attorneys fees, etc., contained in the formal mortgages the amount then due by their terms then exceeded by two or three thousand dollars that due by the equitable mortgage (contract and deed.) Respondent's possible causes of action were, (1) to forclose the formal mortgages; (2) to foreclose the equitable mortgage. He could not do both since they are inconsistent. At the opening of court plaintiffs in error made in open court an offer to allow respondent to take judgment of foreclosure of the equitable mortgage for the entire amount unpaid thereon, viz., $20,400. and all monthly payments unpaid, which offer was unqualifiedly and unreservedly refused by respondent (fo. 17, page 10.) Over objection and exception respondent then introduced evidence of the formal mortgages, the amount due on each and also showed default in paying the $20,400. provided by the contract, respondent's demand for the payment of that sum or in lieu thereof possession of all the lands and also that respondent had declared to plaintiffs in error that upon their default in maintaining the

monthly payments, all their rights in the contract had ceased—that the contract was forfeited (18 and 20.)

These proceedings set out in full in the record (17 to 20) contain all the evidence and proceedings had at the trial. See trial judge's certificate, (33) also that to this court (211-212). This certificate (33) is persuant to express provisions of the statutes of the State of Minnesota relative to making, settling and certifying settled cases and formally incorporating the same into the record.

> "The party preparing a bill of exceptions or case "shall * * * * present the same to the judge or "referee who tried the cause, for allowance or set- "tlement and signature, upon a notice of five "days. * * * * The case or bill, being examined "and found or made conformable to the truth, "shall be allowed and signed by the judge, referee "or other officer acting instead of such judge or "referee, as provided herein."

Gen. Stat. Minn., 1894, §5400.

Upon this showing the trial court entered judgment ordering the foreclosure of all the formal mortgages, for the several amounts, attorney's fees, etc., found due on each—but wholly silent as to the equitable mortgage. To the fact that during this "trial" no opportunity was offered to present or litigate any defense to a demand of foreclosure of the equitable mortgage attention will be further directed later

—enough here to say that by respondent's acts that subject matter was in no manner before the court for any purpose, his then action not only resting upon wholly different facts, and proceeding along lines entirely hostile to any such action, but himself at that period in this litigation expressly refusing the then offered entire relief possible upon the repudiated cause of action, and denying the existence of any power to foreclose the equitable mortgage, even of the then existence or validity of any such mortgage. From that judgment plaintiffs in error appealed to the State Supreme Court, raising in that appeal but two matters for consideration, vis., (1) That all the formal mortgages foreclosed were merged in the equitable mortgage, and (2), That under the pleadings as construed in the action by respondent and the trial court, no foreclosure of that mortgage was proper *in this action*. Of these that court sustained plaintiffs in error in (1), reversing the judgment because of the contrary holding of the trial court, but ruled against them on (2), holding the complaint broad enough to warrant that relief. (104 to 110.) The opinion contains the following:—

> "The judgment appealed from is reversed and "set aside, together with all subsequent proceed- "ings in the direction of its enforcement if any "there be. Upon the remand of the cause to the "court below it will proceed to determine the "amount due upon the equitable mortgage, amend "its findings of fact to correspond, and also

"amend its findings of law in accordance with "the views herein expressed." (110.)

Prior to the remand plaintiffs in error petitioned that court for a re-hearing and modification upon these directions to the trial court, but the petition was denied, (78 to 88 and 89). In Minnesota the rule regulating petitions for re-hearing is,

"The applicant must be able to show some "manifest error of fact into which counsel or "the court have fallen in the argument or decis- "ion of the case as, for example, that a provision "of statute decisive of the case has, by mistake, "been utterly overlooked by counsel or the court; "or, perhaps that a case has been decided upon a "point not raised at all upon the argument, and "there be strong reason to believe that the court "has erred in its decision; or unless in a case "where great public interests are involved, and "the case has either not been fully argued, or "strong additional reasons may be urged to show "that the court has erred in its ruling. But "where a question of law has once been fully dis- "cussed on the argument and considered by the "court, we can not admit that a party is entitled "to a re-argument on the ground that there is "manifest error in the decision."

Derby vs. Gallup, 5 Minn. 85 (119),

Cited and reaffirmed in

Densmore vs. Shepard, 46 Minn. 60–61.

The denial here is general, no reason is assigned. Upon the remand plaintiffs, upon full showing, moved the trial court for an order allowing them to serve and file their supplementary answer setting up in defense as against any foreclosure of the equitable mortgage an election by respondent to pursue to final judgment an inconsistent remedy, which elected procedure was, under the facts at the trial, sufficient to allow the awarding of a full, complete and perfect remedy to respondent, but which relief he then refused to accept; estoppel by conduct further to prosecute the cause and setting up explicitly their claim that any further proceedings upon the equitable mortgage, especially if the offered defense were refused to be heard, would be a taking of their property without due process of law and without giving them their day in court, and void under the provisions of the 14th amendment to the Federal constitution. (92 to 98) This motion was objected to by respondent upon the sole and express ground that all matters in said answer and all defenses therein had been duly and fully determined against plaintiffs in error at the prior appeal and were then res judicata. (112 and 99) At the so-called "hearing" on the motion of respondent for amended findings and judgment foreclosing the equitable mortgage plaintiffs in error appeared and offered due and formal proofs of the former action in ejectment, its decision against respondent on the ground that

the contract and deed to him under which he claimed title constituted an equitable mortgage and that the offer of judgment of foreclosure thereof had been expressly withdrawn prior to the submission of the cause at its first trial. Respondent objected to all the above and to any evidence whatsoever upon the ground that everything save the foreclosure of the equitable mortgage was concluded by the former decision on appeal. The court sustained all these objections, (112 and 100) refused to hear plaintiffs in error save upon the sum due upon the equitable mortgage, and entered judgment foreclosing that mortgage after so refusing to hear any defense thereto. From this judgment plaintiffs in error appealed to the State Supreme Court, which as before stated, affirmed it upon the sole ground that the prior decision was the law of the case. (181 to 183]

Since I think it a fact that the merits here depend largely upon precisely what was done (or what plaintiffs in error could have done) at the first trial, attention is now requested thereto more specifically. Respondent did not then offer to prove a single fact relative to the equitable mortgage—save as here stated, but, repudiating that, sought to prove only (1) The existence and sum unpaid on the several formal mortgages (aggregating then nearly $3,000 more than was collectable by the equitable mortgage.) (2) That the contract (Exhibit "E") had become void, and was no obstacle to the foreclosure of the old mortgages, indeed, that they were the only securities. Hence his proof was of a demand,

not for any monthly installments, but for the entire sum ($20,400) secured by the contract, or in lieu thereof immediate possession of the lands, and (3) that all rights under the contract of plaintiffs in error had ceased. Also (4) that the contract was forfeited unless full payment was immediately made at the time of the demand, which was some time before bringing this action. The repeated objections of plaintiffs in error to the evidence of any of the formal mortgages as then non-existent were overruled. The assignments of error and briefs of plaintiffs in error upon the first appeal are found on pages 27 to 42 inclusive of the record. Assignment No. 5 refers, as shown later in the brief, solely to matters distinct from election of remedies and the underlying principles of res judicata here relied upon.

Plaintiffs in error made the claim under the Federal constitution, 1st, In the supplementary answer in the trial court [97-98], 2nd, In assignments 7, 8 and 9, assignments of error on their 2nd appeal [142], 3rd, In their 5th position as stated in that brief [144, page 80,] and 4th, In their main brief [fol. 153] and 5th, In the oral argument before the court. See certificate of Chief Justice, fo. 209.

It has ever been the settled law of the State of Minnesota that, save where excluded by some imperative rule, the filing by a defendant of a supplementary answer is a matter of right and not of discretion.

Malmsten vs. Berryhill, 63 Minn. 1.

The questions involved are, therefore;—

[1] Did plaintiffs in error have any adequate opportunity to present, and have properly considered by the court their defenses to any foreclosure of the equitable mortgage as such defenses existed when, or at any time after, respondent sought such foreclosure?

[2] As to plaintiffs in error, do the proceedings shown by this record show "due process of law?"

Possibly, [3) Did plaintiffs in error possess and offer to prove any defense of sufficient merit to warrant their demand for its hearing and consideration?

ASSIGNMENT OF ERRORS.

I.

It was error in the trial court to refuse leave to file the supplementary answer prayed for by plaintiffs in error, and error in the State Supreme Court to affirm the judgment entered in said cause upon said refusal by said trial court.

II.

It was error in the trial court to reject the evidence offered by plaintiffs in error to substantiate their defense in said cause, and error in said State Supreme Court to affirm the judgment based upon such refusal.

III.

It was error in said trial court to refuse the demand for a trial made therein by plaintiffs in error, and to order judgment against them upon amended findings made solely upon the evidence submitted at the former trial, when the defense asserted after the remand, did not exist and was not pleaded nor offered to be proven, and error in said State Supreme Court to affirm the judgment so entered.

IV.

It was error in said State Supreme Court to hold plaintiffs in error bound by the former judgment therein upon the first appeal, res judicata.

V.

It was error in said State Supreme Court to remand said cause upon said former appeal with directions to the trial court to amend its findings of fact, upon the evidence submitted at the former trial, and thereon to order judgment in favor of this defendant in error for the foreclosure of the equitable mortgage.

VI.

It was error in said State Supreme Court to hold these plaintiffs in error bound by such directions in said decision upon said former appeal and to refuse to allow them to be heard upon, and in refusing to consider their said defense based upon the controlling election by

defendant in error to rely solely upon his formal mortgages, and to hold the contract and deeds of no force, such election having been persisted in and relied upon until after the entry of final judgment in said State Supreme Court holding that said formal mortgages were of no force and that no liens upon the lands and premises involved existed under them.

VII

It was error to hold plaintiffs in error and the court bound by said former decision as the law of the case.

IX.

It was error in said State Supreme Court to hold that said proceedings constituted due process of law, as required by Sec. 1 of Art. XIV of the amendments to the Constitution of the United States, and error to hold therein that thereby plaintiffs in error were not deprived of their property without due process of law.

X

It was error to hold that in said proceedings these plaintiffs in error were not denied the equal protection of the laws.

XI

It was error to refuse to plaintiffs in error their right to be heard upon, and to present their

defense predicated upon the former election made in said cause by the defendant in error to claim solely under the formal mortgages, such election having been by him persisted in after the offer made to him in open court at the trial in said cause that judgment might be therein entered without contest for the foreclosure of the equitable mortgage and for the entire amount secured thereby, which offer was expressly refused by defendant in error, his said election having been persisted in until after the final judgment upon appeal holding said formal mortgages void and of no effect.

POINTS AND AUTHORITIES.

PRELIMINARY.

It is clear that, upon the complaint, respondent might, upon demand, have been compelled to elect between the different causes of action set forth therein. Whether or not plaintiffs in error did, in law, make such demand, it is patent that respondent did elect, precisely as though the demand had been made and sustained by the court. It follows that at the first trial there was no opportunity or occasion to offer or present any defense to the equitable mortgage as distinct from the formal ones, even had there then existed such as were perfect. The then renunciation of all claims by respondent save upon the old mortgages effectively removed

the equitable mortgage from the case so far at least as concerned that trial. It cannot be maintained, in opposition to the above, that all respondent really did was to present the entire subject matter to the court, leaving wholly to it to determine what cause of action he had and what remedy he was entitled to. (1) He did not offer to prove a cause of action upon the equitable mortgage. (2) The claims he did assert negatived the then existence of any equitable mortgage. (3) His refusal to accept full relief upon that cause of action was absolute and unconditional. (4] He plainly elected to stand solely upon the old mortgages with the extra $3,000 recoverable thereon. Also, succeeding in his demand upon the old mortgages below and so driving plaintiffs in error to appeal, it is equally plain that throughout the entire cause up to the adverse decision upon the appeal, respondent stood upon his original demand and causes of action only. After such election and renunciation and while necessarily standing upon both, he could not, even if he attempted to, change his position.

It follows that, if not in law amounting to a demand that respondent elect between his inconsistent causes of action, all that plaintiffs in error said and did relating to the equitable mortgage and any cause of action based upon it, was wholly voluntary, and in no manner called for at, or pertinent in that trial. In order to save expenses, or because they were at that time willing to forego all defense to the equitable mortgage, it was competent for them to

make the unqualified offer of full judgment thereon. But they were in no way bound to hold that offer open and this record shows that they did in fact withdraw it before the first remand on appeal, and before respondent had acted regarding it further than to unconditionally reject it. By what principle then, could they be prevented at any time thereafter, from asserting as against any demand for foreclosure of this repudiated mortgage any defense they might have? It is a certainty that no opportunity to present any defense to the equitable mortgage existed prior to the remand upon the first appeal.

Separately of Our Assignments.

No. 5.

Error in the direction by the Supreme Court to the trial court, at the first appeal.

No reason in justification of that direction is found in the opinion [other than as to the question of pleading and practice then decided, and not touching any point here made] save only this: The Justice writing the opinion said in it, [110] "No good reason "existed at the termination of the trial, *and none now* "*exists* why plaintiff should not be entitled to a fore- "closure in this action of his equitable mortgage." If this be confined to the objection of pleading just passed upon, it is good. But it as later construed by the trial and Supreme Courts, as a direct holding that when that opinion was written no defense existed to such foreclosure, then it is wholly unwar-

ranted, and a plain denial to plaintiffs in error of any "day in court." It so constitutes not only a want of, but a plain denial of, due process of law.

It is however said that plaintiffs in error had presented and litigated all their defenses to the foreclosure of the equitable mortgage later sought to be interposed. That this is a total misapprehension of their then and now positions most clearly appears. Their defense in the trial court was then thus stated by them. (37) "That plaintiff, having elected at the opening of this trial not to accept a decree herein for the foreclosure of said equitable mortgage, is not entitled to any relief herein." In the supreme Court, assignment 5, (49) "The court erred in not ordering judgment of dismissal." Appellants' position, No. 8, (54) "Respondent having sued on those mortgages only, and having expressly refused to take a decree for the relief he was entitled to on the facts, but not by his pleading cannot now, on appeal, shift his position and claim to be entitled in this action to a decree for the foreclosure of the equitable mortgage." It is to be noted at the outset that this objection was the same in both courts, and goes no further than the point that respondent could not, *in this action* obtain judgment of foreclosure of the equitable mortgage. In his then brief in the Supreme Court, commencing at fo. 62, in presenting this objection, he expressly so states it, viz., Respondent is not entitled, in this action to a foreclosure of the equitable mortgage. ~~He elected to bring action only for foreclosure of the eq-~~

~~uitable mortgage~~. He elected to bring action only for foreclosure of the old mortgages, and tried the case below solely upon that theory and claim. Now, on appeal, he cannot be permitted to shift his ground, and demand other relief. He also on the trial below expressly declined to accept such relief then offered him though his complaint did not entitle him to claim it." And in his reply brief (66), "Respondent's demand, that in case the judgment appealed from be not sustained, they be allowed to demand in this action, a foreclosure of the equitable mortgage, involves an attempted total change of base on his part and is inadmissible." Immediately following this [67 to 69] the reasons for this position are stated, being in short, [1] That the theory of the case as made by himself at the trial was contrary to that essential to such foreclosure. [2] That such theory was fully carried into the findings and judgment of the trial court. And [3], that such a shift of position in pleading would have been a departure. It may not be immaterial here to note that this entire position and objection on the part of plaintiffs in error was and was stated to be only as subsidiary to their main position, viz., that the old mortgages were all merged in the new, which alone then possessed any vitality; also that the manner of their brief presentment in court is consistent only with such understanding of them on the part of both counsel and the court. This matter then presented did not constitute, and was not presented as embodying, any defense to a foreclosure of that mortgage, but only that such relief ought not to be

granted in that action. No election of remedies is here set forth or claimed, and no estoppel extending beyond the then action.

Noting now the defense offered and sought to be litigated after the remand and set forth in the supplementary answer and the evidence offered. This defense, if valid at all, was full and complete, not only as affecting the present action but in any action and at all times. It may in brief be thus stated: Respondent, knowing all the facts, elected at the outset to bring and prosecute his action upon the formal mortgages only, therein denying the existence of any cause of action in him based upon the equitable mortgage. While in fact he technically possessed no such cause of action, yet by means of the offer of full judgment for all the relief he was entitled to upon the equitable mortgage, made in open court by plaintiffs in error, and remaining open until the final submission of the cause [114] respondent's action was made and so continued issuable in complete relief to him; the only reason for his not therein recovering judgment for everything he was entitled to, being his express refusal to accept such relief and judgment, *a refusal persisted in by him until after final judgment* against him in the court of last resort. This case falls within the second class of cases of election of remedies, viz., where the election is not final nor binding when the action is brought but becomes such when persisted in to final judgment. [See authorities cited in appellants' brief below, record herein, fos. 167 to 171, and infra.] Furthermore the case is fully within and covered by the principles

underlying the doctrine of res judicata, in that where, with knowledge of the facts, such a course is so elected and persisted in to final judgment, the party meantime refusing the offered full and complete redress made by his opponent and pressing his cause of action, which is not only inconsistent with, but necessarily destructive of, the cause of action discarded by him, thereby putting his adversary to the needless expense of an entire trial below and upon appeal, he is thereby estopped from requiring his adversary to re-litigate the entire matter upon such discarded and repudiated theory.

Warner vs. Godfrey, 186 U. S. 365.
No. 191 October term, 1902.

At the time of the decision against him in the Supreme Court upon the first appeal, respondent had his full day in court, had also had his locus penitentiae extending from the trial below until that time. By the rule asserted by plaintiffs in error his election became final and conclusive at the time of this final decision on appeal, and not before.

The record shows conclusively that the above was the precise status of the case, so understood by all parties in the trial court at the time when the supplementary answer was offered. [91 et Seq.] The trial court certifies "After the decision of the Supreme Court on the appeal heretofore taken in this action and after the mandate remitting it to this court had been duly filed therein, the following proceedings were had in this court: Notice and mo-

tion for leave to serve and file a supplementary answer." This notice and motion immediately following [92 et seq.] contains the following "Said motion is based upon the following grounds, viz., The defense therein set forth is one originating since the former trial of this cause in this court and dates in its fullness only from the entry of judgment in said cause on appeal in the Supreme Court of Minnesota. * * * [93] Said motion is based upon the pleadings and all the files in said cause and upon the judgment of the Supreme Court on appeal herein and upon the affidavit hereto attached, etc." The judgment on appeal became thereby part and portion of the supplemental answer and all and every allegation requisite or proper for the formal presentment of the defense relied upon and just stated appears. The allegations contain in No. 3 of the supplemental answer taken in connection as they must be with the above facts in the case, is not a mere allegation of a conclusion of law, but, plainly referring to them as it does for its subject matter, it is a mixed allegation of law and fact always permissible by the recognized practice of the State of Minnesota.

Curtis vs. Livingston, 36 Minn. 380.
Buckholts vs Grant, 15 Minn. 329 [406)
Webb vs. Bidwell, 15 Minn. 394 [479]

See Swafford vs. Templeton, 185 U. S. 487, where the following averment in a complaint was held sufficient to give jurisdiction, viz., "Plaintiff became, and was, possessed of the right of suffrage as

an immunity or privilege of citizenship of which he could not be deprived by the enactment of Chap. 163 under the circumstances aforesaid." To this complaint a demurrer was filed and the order sustaining the demurrer on appeal held error.

It must not be overlooked that no trial was had and no evidence admitted in the trial court subsequent to the first remand. A mere perfunctory sitting whereat the findings were amended only was allowed by the trial court, wherein the court recites "On motion of the plaintiff's attorneys, and in accordance with said decision and judgment of the Supreme Court the said findings of this court herein are hereby modified and amended as follows:" The matter was precisely thus understood and so acted upon by respondent's counsel and the trial court (fo. 99.) Again, at the hearing upon respondent's motion to amend the findings and judgment (112) this defense was again offered and in each case objected to by respondent upon the ground that all matters contained therein including the defense itself were res judicata in favor of respondent, which objections were upon that ground sustained by the trial court. Also in the Supreme Court in their brief plaintiffs in error explicitly made this defense. See assignments of error 5 and 6, fo. 142, the latter of which reads as follows, "Erred in not holding that plaintiff had elected to pursue an inconsistent remedy and had precluded himself from foreclosing the equitable mortgage." In their main brief on the second appeal, paragraph 2 (148 to 151) and again in their reply brief (167 to 174) this matter is set forth

more fully. In fo. 167 it is said "Two classes of fact, embraced within the matter of election of remedies, give rise to two rules determining when such election becomes final and conclusive. * * * In one class a new right springs into existence upon the initial act. * * * (168) "But in the other class of cases no new right arises. The party merely moves along one of two or more alternative lines of procedure, based upon rights already existing or believed to exist. But that the differing rights and consequent remedies are inconsistent all could be followed, and no election would arise. It is only by following one that the other can be barred, and that upon principles underlying the doctrine of res judicata. Every litigant is entitled to an opportunity to be heard upon his demand or defense and to present his asserted right of action or defense for consideration and determination by the court. But he can have but one "day in court," if, having the opportunity to present and be heard upon his entire claim or defense, he chooses to present but a portion of it, he is as fully bound by the decision as he otherwise could have been. He may not split his cause of action nor present his defenses piecemeal. In either case, at any time before final judgment he may petition for leave to amend so as to present his entire claim. But if he delay until the court has finally passed upon his contention he is forever bound. The judgment is res judicata. In this case respondent might at any time before the former judgment on appeal have dropped his claim upon the formal mortgages, and have demanded and received appropriate relief upon the con-

tract." Citing and commenting upon many cases. Again (fo. 174) "He had had his full day in court and then might have recovered full relief. His failure to obtain any relief was wholly due to his own act. Since this effect is the legal outcome of his intelligent choice and determination he must be held to have intended such result.

West vs. Platt 127 Mass. 372.
28 Enc. Law 528 and note 4.

* * * Having insisted upon his chosen demand until the entry of judgment on appeal, which is a final judgment upon that matter, respondent is now bound by his election."

But a conclusive reply here to any claim that the supplemental answer did not sufficiently set up a defense distinct from the matter passed upon on the first appeal is this: It was and is the settled law of the State of Minnesota that the filing of a supplemental answer, unless the pleader be barred, is matter of right, and the court has no discretion to refuse it, and its sufficiency is thereafter to be determined in the usual manner.

Malmsten vs. Berryhill, 63 Minn. 1.

Were objection made to this supplementary answer as indefinite or not sufficiently stating the facts, or as legally stating no defense, still it would be amendable on motion, (in this State amendments of this kind are granted as a matter of course)

Cool vs. Kelly, 85 Minn. 359, but no question or objection of the kind was made or considered in the trial court. It was excluded solely upon the ground that no answer, and no defense, however valid upon its face, could be received by the trial court; that the latter was bound by the directions to amend its findings and enter the prescribed judgment and was powerless to do more or less. See above recital in findings by the trial court "In accordance with said decision and judgment of the Supreme Court the said former findings of this court herein are hereby modified and amended as follows:"

This defense did not exist at the time of the trial below or upon appeal, and could not be and was not in any manner before the trial court nor before the State Supreme Court at any time prior to its decision upon the first appeal. By no possibility therefore could this defense have been considered at the time of the judgment later held by both courts to have finally concluded plaintiffs in error upon it. But it is claimed that this identical defense was fully presented to and considered by the Supreme Court of the State by means of the petition for a modification of the opinion filed therein by plaintiffs in error. The statement of a few of the answers to this position must suffice. (1) As to this matter the State Supreme Court has appellate jurisdiction only. It does not and cannot upon appeal pass upon any matter not considered and determined by the trial court. (2) A petition for re-argument or modification is wholly confined to matters and issues appearing in the then record in the appellate court. Sug-

gestions or statements contained in the petition, of any other matters either as then existent or thereafter to exist cannot be considered by the court nor any decision as to the legal effect thereof then made. The substantive matter of this petition was that upon the entry of judgment upon the opinion in the Supreme Court (in Minnesota petitions of this kind must be filed and decided prior to the entry of judgment; Rule XVII of the Supreme Court of Minnesota reads as follows:- * * * "When a decision is filed or an order entered determining the cause, the clerk shall mail notice thereof to the attorneys of the parties, and no judgment shall be entered until the expiration of ten days thereafter." And Rule XXXVII,- "Applications for a re-hearing shall be made *ex parte*, on petition setting forth the grounds on which they are to be made, and filed within ten days after notice of the decision.") in connection with the other facts therein stated an election of remedies became perfect and operative against respondent. (3) At most the petition called in question the correctness of the opinion and direction of the court. This is not sufficient ground upon which to ask a modification or for a rehearing.

"But where a question of law has once been "fully discussed on the argument and considered "by the court, we cannot admit that a party is "entitled to a re-argument on the ground that "there is manifest error in the opinion."

Derby vs. Gallup, 5 Minn, 85 (119).
Desmore vs. Shepard, 46 Minn. 60-61.

(4) The denial of the petition is general. Had the court then understood that it was denying petitioners in error an opportunity to present, and to the trial court power to consider and decide upon a defense not possible theretofore to have been presented or considered it then necessarily violated their plainest fundemental rights as litigants and sought thereby to nullify as to that case the provisions of the 14th amendment. This presumption cannot be entertained. It must therefore be presumed that the denial rests solely upon some of the above legitimate grounds. (5) Plainly the Supreme Court so understood and intended. The direction in the opinion and the reason for it are plainly stated and in neither case are broad enough to possibly include any decision upon the new matter which might or might not be thereafter offered in defense. [6] An important part of the defense later offered was not shown in any manner by the records and facts then before the Supreme Court, nor was it set forth in the petition for a rehearing. This is that portion of the records and proceedings in the prior ejectment suit, showing clearly that respondent then sought a foreclosure of the equitable mortgage in case his ejectment suit failed. Also that suit was decided against him on the sole ground that the contract and deed therein pleaded were in law an equitable mortgage. That his action and determination to press his claim for foreclosure of the old mortgages necessarily and intentionlly prevented plaintiffs in error from paying his just claim by so involving the lands and their title in litigation as to prevent them from making any

sales of said land and thereby obtaining the necessary means of payment.

Assignments, (1), (2) and (3). Error in the trial court not to receive the supplemental answer and proffered evidence, and to deny a hearing to plaintiffs in error.

Had plaintiffs in error, intermediate the remand and later perfunctory order for judgment, fully paid, or respondent released his entire demand, or had he assigned it to a third party against whom the former then held judgments or enforceable demands exceeding it in amount, or had any other unquestioned defense meantime originated, it will hardly be claimed that the trial court was powerless to hear the same. It should consider the opinion and directions as applying only to the state of facts existing at the time the appeal was taken and carried up in the record. But the fact that the proffered defense was one necessary to be established and declared good either as to matter of fact or law is here immaterial. Such denial of a hearing upon an undenied defense in such manner would be a denial of a day in court and hence of due process of law.

Klauber vs. San Diego Co. 98 Cal. 105
Warner vs. Godfrey 186 U. S. 365
Reynolds vs. Stockton 140 U. S. 254.
McCoy vs. McCoy 29 W. Va. 795.
Seamster vs. Blackstock 83 Va. 233.

(A synopsis of these cases may be found in this record, (161 and 157-8.)

Assignment (6). Error in State Supreme Court in holding, upon 2nd appeal, that the trial court and plaintiffs in error were bound by the former directions to the trial court.

Warner vs. Godfrey, 186 U. S. 365 Also see points and authorites under Assignment (5).

It is true the State court held that it had formmerly considered and decided the matter in its entirety and that its then directions to the trial court were res judicata as to plaintiffs in error. It is also a fact that the trial court did conform to those directions in all it did subsequent to the remand. But the question is one for final adjudication by this and not by the State court. By law it is made the duty of this court to enforce as well as to construe all the provisions of the federal constitution and to see that the several states, in all their governmental divisions, judicial

Chicago Ry. Co. vs. Chicago 166 U. S. 266.
Scott vs. McNeal 154 U. S. 34.

as well as legislative and executive, keep within the prescribed bounds. A state supreme court can no more escape this supervision by declaring its acts clearly within its lawful powers, than its legislature can by prefixing to an unconstitutional statute, a declaration to the contrary.

Missouri Ry. Co. vs. Elliot 184 U. S. 695.

McCullough vs. Virginia 172 U. S. 102.
Columbia Power Co. vs. Columbia Ry. Co. 172 U. S. 475.

It is also long settled law that the slightest infraction, or infringment of that constitution is as fatal as the greatest. Also that here the law and this court looks at the very substance of the right intended to be protected, and not to the mere forms or methods of action whereby it may be affected.

Chicago Ry. Co. vs. Chicago, 166 U. S. 226
Louisville Ry. Co. vs. Schmidt 177 U. S. 230.
Boyd vs. U. S. 116 U. S. 616, 635.
Gulf Ry. Co. vs Ellis 165 U. S. 150, 154.

While, usually, that is due process of law which is sanctioned by the system of laws in force in the given state, yet an exception to this necessarily exists where by following out that system of laws and that process of law in the given case there must necessarily arise any violation of the fundamental rights secured by the federal constitution.

Guthrie, "The Fourteenth Amendment" 72, citing
Kennard vs Louisiana 92 U. S. 480-481.
Caldwell vs Texas, 137 U. S. 692.
Leeper vs Texas, 139 U. S. 462, 468.

Assignment No. (7). Error in State Supreme Court to hold plaintiffs in error barred by the former decision as the law of the case.

The facts on the second appeal were wholly different from those on the first, and the questions of law presented entirely distinct. By the settled law of this state "the law of the case" had no application.

Kray vs Muggli 84 Minn. 90—94.

While ordinarily the matter of the law of the case doubtless would be one of pure state law involving no federal question, the case is otherwise here since such holding necessarily operated to deprive plaintiffs in error of a "day in court," upon their defense.

Chicago Ry. Co. vs Chicago, 166 U. S. 266.

Assignment (9). Error in State court to hold that its proceedings constituted due process of law and error to hold that thereby plaintiffs in error are are not deprived of their property without due process of law.

That such denial of due process of law, and taking of property without due process of law, though done by a court, or necessarily resulting from the enforcement of its judgment is as much prohibited and invalidated by the constitution as though brought about by direct executive or legislative act has long been settled law.

Chicago Ry. Co. vs. Chicago, 166 U. S. 226.

These holdings by the state court, if untrue in fact and law, go for naught.

This court has held:—

"But a state may not, by any of its agencies, "disregard the prohibitions of the fourteenth "amendment. Its judicial authorities may keep "within the letter of the statute prescribing forms "of procedure for the courts, and give the par- "ties interested the fullest opportunity to be "heard, and yet it might be that its fullest action "would be inconsistent with that amendment. "In determining what is due process of law, re- "gard must be had to substance, not to form. "This court referring to the fourteenth amend- "ment has said: 'Can a state make anything due "process of law, which, by its own legislation it "chooses to declare such? To affirm this is to "hold that the prohibition to the states is of no "avail, or has no application, where the invasion "of private rights is effected under the forms of "state legislation.' Davidson vs. New Orleans, "96 U. S. 97, 102. The same question could be "propounded, and the same answer should be "made in reference to judicial proceedings incon- "sistent with the requirement of due process of "law."

Chicago Ry. Co. vs. Chicago, supra.

It is also settled that these constitutional provisions designed for the security of person and property are to be liberally construed in favor of the pro-

tection designed. Said this court in Boyd vs. U. S., 116 U. S. 616:

"It may be that it is the obnoxious thing in its "mildest and least repulsive form; but illegitimate "and unconstitutional practices get their first "footing in that way, namely by silent ap- "proaches and slight deviations from legal "modes of procedure, This can only be ob- "viated by adhering to the rule that constitu- "tional provisions for the security of liberty and "property should be liberally construed. A "close and literal construction deprives them of "half their efficacy, and leads to gradual de- "preciation of the right, as if it consisted more "in sound than substance. It is the duty of the "courts to be watchful of the constitutional "rights of the citizen, and against any stealthy "encroachments thereon. Their motto should be "*obsta principiis.*"

This was cited and followed in Gulf Ry. Co. vs. Ellis, 165 U. S. 150, wherein a statute imposing an attorney's fee of but ten dollars upon railroad companies where damages were refused payment in prescribed cases was upheld. Nor does it matter that but little is involved.

Sentell vs. Railway Co. 166 U. S. (616) 635.

In Hovey vs. Elliott 167 U. S. 409, this court held that

"While a party who is in contempt is not enti- "tled to be heard as to matters of mere favor,

"yet it is a denial of due process of law to strike "out an answer, and render a decree pro con- "fesso, also that said judgment, rendered for "want of an answer so stricken out, is void "for want of jurisdiction and may be collater- "ally attacked."

In the opinion it is said:

"Looking at the substance, and not at the form, of "the decree in the case of Hovey vs. McDonald, "upon which the rights of plaintiff in error de- "pend, it is plain that the judgment was sub- "stantially one without a hearing, for of what "efficacy or avail was the summons to appear "when the court which issued the summons "rendered its judgment upon the theory that "the ~~judgment~~ was inefficacious. and that the "defendant had no right either to appear or to "be heard in his defense? As said by this court "in Cable Co. vs. Adams, 155 U. S. 689, 15 Sup. "Ct. 268, 360: 'The substance and not the "shadow, determines the validity of the exercise "of the power.' * * * "There is no distinction "in principle between determining a cause upon "issues not raised by the pleadings in the actual "absence of the party, and rendering a decree by "refusing to permit a defendant to be heard in "his defense, and, indeed, by striking the plead- "ing containing such defense from the files."

It is true that the general rule is that this amendment acts specifically upon the state, that any mere error in a State court in applying the law, or in the decision of a case, ex. gr., in misconstruing a

contract and thereby inpairing the real obligation of the contract does not violate its provison nor confer any jurisdiction upon this court. But this rule has no application where, as here, the state court, transgressing its functions, attempts to render a judgment without jurisdiction of the subject matter or without notice to, or opportunity to be heard by the person against whom such judgment operates.

Guthrie Fourteenth Amendment, p, 105, and cases cited above.

Illustrative of the decisions touching matters included in a judgment which was not properly before the court is the very recent case in Nebraska, Richley vs. State, 91 N. W. 867, holding a statue of that state void in so far as it purports to authorize the question of the good faith of a prosecuting witness, in instituting the proceedings, to be determined at the same time that the defendant is tried, and authorizing taxation of costs against him if it be found that he acted maliciously and without probable cause in filing the information, a taking without due process of law.

Assignment No. (II). The defense offered was sufficient in substance to require consideration, and to give this court jurisdiction. Its exclusion calls for a reversal of the judgment.

The rule stated in Swafford vs. Templeton 185 U. S. 487-493, as I think, should apply here, so far as to bring this case within it, if the record shows that the offered defense was in fact refused and a

hearing upon it denied. This rule applies as well to cases brought here by writ of error from a State court as to jurisdiction in the federal circuit courts.

> Life Insurance Society vs. Brown, No. 320, Oct. Term 1902. 23 Sup. Court Rep. (123-124. [Decided Dec. 1st, 1902)

Here the alleged federal question was in no manner in or connected with the original controversy. It could not appear in the original pleadings. It arose during the proceedings in the State courts and is wholly federal in nature. It is the sole basis of jurisdiction here. As the rationale of the rule there established, this court said in the Swafford case, (185 U. S. 487-493).

"But the doctrine referred to had no application "to a case brought in a federal court where the "very subject matter of the controversy is Fed-"eral, however much wanting in merit may be "be the averments which it is claimed constitute "a violation of the Federal right. The distinc-"tion between the cases referred to and the one "at bar is that which must necessarily exist be-"tween controversies concerning rights which "are created by the Constitution or laws of the "United States, and which consequently are in "their essence Federal, and controversies con-"cerning rights not conferred by the Constitution "or laws of the United States, the contention "concerning which may or may not involve a "Federal question depending upon what is the

"real issue to be decided or the substantiality of "the averments as to the existence of the rights "which it is claimed are Federal in character."

In each case the question is solely one of jurisdiction, and in each the basal ground is solely federal in character. As here the violation of the federal right is admitted (or must be so) provided only that the prior denial of a hearing exists. This court held in Penn. Ins. Co. vs. Austin, 168 U. S. 685 and in Andrews vs. Andrews, No. 23, Oct. Term, 1902, 23 S. C. R. 237-239, that the *jurisdiction* of this court is not affected by the fact that the state court may have correctly decided the Federal question. It is also held by this court that upon a writ of error it is competent for this court to examine the facts contained in an agreed statement of facts to ascertain whether the facts support the judgment.

Harrison vs. Perea, 168 U. S. 311.
Kelly vs. Rhoades, No. 93, Oct. Term 1902, 23 S. C. R. 260-261.

This rule must apply here since this record contains a full exemplification of all the facts, testimony and proceedings at the trial. In proof that this record contains everything, see ~~main~~ brief page 4. Hence here the initial subject matter of jurisdiction undeniably exists. This court therefore necessarily has jurisdiction to ascertain, and it is its duty to determine, whether or not the allegations of fact as to there having been a defense offered in the matter which was excluded in the State courts, are true.

Manley vs. Park. No. 120, Oct. Term 1902,
23 Sup. Ct. Rep. 208-9.

But it was the duty of the State courts to have heard and decided that question. In investigating that matter, then, this court is but doing what the State courts should have done. This duty, or exercise of jurisdiction by this court, is wholly different in its origin, nature and effects from a determination as to whether it has jurisdiction—it is the exercise of jurisdiction already vested in this court. Therefore the question of the materiality, or want of substance, in the proffered defenses has no bearing on jurisdiction—it affords no possible support for a motion to dismiss.

Nevertheless, for several reasons I here state those defenses with some of the reasons upon which they rest and certain of the authorities supporting them. From the fact that all evidence offered was excluded on the same ground as the supplemental answer—want of power to consider it, I think this evidence, as well as the supplemental answer, is here to be considered. It is also a fact clearly appearing that this evidence consists in the main, of original records on file in the trial court in a prior action between the same parties and concerning the same land.

The initial facts upon which these defenses were predicated, as thus shown, are:

Plaintiffs in error owned a large tract of improved lands situate in close proximity to the city of Owatonna and of large and increasing value. Upon

this then existed incumbrances to the amount of about $20,000. They needed considerable time in which to effect sales at the advanced price necessary to obtain moneys to repay the advancements of respondent. He very clearly understood all this and from the terms of the contract both parties then intended such necessary time should be allowed; also that the title to all the lands be thereby made and kept in perfect marketable condition. In order that respondent might not be without redress (his debt never due) in case of willful failure, or abandonment by plaintiffs in error, and for interest, the clause providing for a payment of $100 monthly was inserted. It is impossible that the parties intended any forfeiture in fact upon delay or failure to pay one or several of these monthly installments when due. None but a Shylock would so demand and only a fool would consent to such condition. Plainly security only was here intended and that for a considerable time. But practically upon the first failure to pay an installment respondent brings suit in ejectment. In the answer offer to pay all unpaid interest installments is made, but not accepted. He knew this action could not be maintained, but by its means, lis pendens, etc., he could so encumber the title as to prevent consummation of any sales meantime. Upon the inevitable decision that his deed and contract were an equitable mortgage, he moved the court for foreclosure of that mortgage in that action, thus further entangling the lands in litigation. The entire suit being unwarranted, objection to such procedure was made and sustained. Well knowing

all the facts, and that he had no legal right other than such foreclosure, the suit upon the extinct mortgages is brought and their foreclosure with the extra $3,000 insisted upon. He knew he held his debtors wholly in his power—that they retained no means to resent his demands. (His attorneys in this complaint then alleged insolvency, (12 page 7.) Because of these facts they desire to avoid litigation, and at the outset offer him judgment for every penny justly due, with foreclosure, hoping that, with the title thus simplified to be able to sell within the year allowed for redemption, so as to save a little from the wreck.

The first defense is that by so, in bad faith, and with design to sweep the entire property into his strong box, prosecuting this action to final judgment, he is estopped to go back, take up a cause of action he had discarded, and asserted in this action was non existent, and secure as of right the exact relief he previously in open court had spurned. Bad faith, oppressive litigation and exhaustion of his day in court in pursuance of both, and positive renunciation made and of record in court, of both the relief and cause of action, later attempted to be availed of, are the grounds of the alleged defense by estoppel and res judicata. Of these the most was wholly new matter, never before offered in defense, viz., bad faith, designed oppression, ending of his day in court, and the final judgment, determining his asserted causes of action non-existent. In Thompson vs. Howard, 31 Mich. 311, it was held:

"It is well settled that a man may not take

"contradictory positions, and where he has a "right to choose one of two modes of redress, "and the two are so inconsistent that the asser- "tion of one involves the negation or repudiation "of the other, his deliberate and settled choice "of one with knowledge of such facts as would "authorize a resort to each will preclude him from "thereafter going back and electing again."

To like effect see Warner vs. Godfrey, 186 U. S. 365

In 2 Black Judgments, sec. 632, it is said that

"The rule forbids a party to assume succes- "sive positions in the course of a suit or series of "suits in reference to the same fact or series of "facts, which are inconsistent or mutually con- "tradictory."

The rules of the Supreme Court of the State of Minnesota (Nos. XI. and XIV) provide that if either party to an appeal in that court fail to file his briefs at stated times, the court, on motion of his opponent will, without considering the merits, if the failure be by appellant affirm, and if by the appellee, reverse, the judgment or order appealed from. It is settled law there that such judgment of affirmance or reversal, though totally without reference to the merits of law, is res judicata, estoppel by judgment ever after.

Schleuder vs. Corey 30 Minn. 501.
Maxwell vs. Schwartz, 55 Minn. 414.

Also the law of res judicata from splitting a cause of action or omitting a defense, obtains in that

state. It is difficult to perceive any consistency in a law that forever binds a party to an action who by inadvertence neglects to perform a formal act by a given day, or omits to set out in his pleading certain matter he deems unnecessary, yet leaves untrammelled one who intentionally, in bad faith and with design to oppress, renounces his cause of action and remedy to pursue another inconsistent with and destructive of it, such pursuit being continued to final judgment.

As I understand it Warner vs, Godfrey 186 U. S. 365 is in point here But the elements of bad faith and intentional oppression did not exist there. If that trial could be considered as one wherein that plaintiff pleaded all his rights or causes of action, praying for all the relief he was entitled to, then the judgment against him is res judicata on the later demand of foreclosure of the equitable mortgage, since his conduct during the entire trial in renouncing that right and relief excluded it from consideration by the court and constituted a willful exclusion from his case of one ground of recovery—a virtual splitting of his cause of action.

It may be noted, in considering the other defense, election of remedies, that while the plaintiff had but a right to recover his debt and to the avails of whatever liens he had to secure it, yet, in law, he claimed different and inconsistent causes of action and remedies. The doctrine of conclusion by an election of remedies is one of spirit and substance, not one of mere form. It applies wherever a party having or claiming rights giving rise to one or more causes of action, affording either differing remedies,

or a single remedy attainable in different manners or procedure, the several modes of procedure being alternative, by selecting one cause of action or remedy, and following that, whatever the result, is bound by his election, and, though defeated, may not go back and take up an inconsistent cause of action or remedy. The reason for the rule varies with the classes of actions to which it is applicable. In cases where the plaintiff may elect between trover and assumpsit, it is a matter of importance to the defendant to know at the outset which cause of action he must meet—his course in defending will depend on that fact. Hence, in all these and analogous cases, the plaintiff is bound by his election as soon as he brings either action; defendant presumably at once acting, determining his position in defense at the beginning of the suit, the plaintiff is thereby estopped to take the inconsistent position. Here the basis is estoppel and the principle that of estoppel in pais. In the other class of cases both the involved rights and the principle of election is quite different. A plaintiff holds against his debtor an account secured by a chattel mortgage, and a collateral promissory note secured by a real estate mortgage. He may at once maintain actions upon the promissory note and the real estate mortgage, such actions being consistent. Neither the defendant nor the court is prejudiced. But if the several causes of action growing out of a single subject matter or transaction, or the several remedies are alternative so that but one can be taken at a time, then bringing action upon one

does not put the defendant to any change of position; no estoppel arises therefrom to dismiss, and sue upon one of the other causes of action, or, where possible, from amending his pleadings to the same end. But if such plaintiff persist in his first suit to final judgment, losing because of some mischance, or his own act, then he has had his full day in court, has put his adversary to the expense of defending the entire suit, and has completed a proceeding, which unrestricted would soon degenerate into an engine of oppression upon the defendant and and imposition upon the courts—a stigma as well as a blight upon the public administration of justice. Here the basis of the conclusion by election includes public policy; the avoidance of multiplicity of suits, the protection of the defendant from imposition, and the principles underlying the rule against splitting causes of action. Clearly in this case, either with, or independently of, the proffer of judgment, that plaintiff might at any time before submitting the cause for decision, have applied to the court for leave to amend his complaint, or, if that be sufficient to cover both, to change his cause of action and demand judgment therein based upon the equitable mortgage, such motion being addressed to the discretion of the court. Suppose the defendants, though possessing a perfect defense on the merits against the old mortgages, had failed or refused to present it,—they too might petition to be let in to present it at any time before judgment. But after final judgment against them on appeal, it would be too late. Res judicata would confront them. Why should one be

bound and the other free? Many authorities supporting this position are cited or stated in my brief on the second appeal below (record fos. 165 to 177 and 82 to 87.) Many others exist, some of which may be cited in my printed argument herein.

The judgment of the state court is single and rests solely upon its decision upon the federal question.

The usual doctrine of the law of the case exists in its fullness in Minnesota.

Bradley vs. Norris, 67 Minn. 48.
Terryl vs. City of Faribault, 84 Minn. 341.
Clark vs. Richards, 72 Minn. 397.

The former decision held, the law of the case, concluded the court so that it had no jurisdiction after having so decided to determine as to the validity of the defenses offered. It is so expressly stated in the opinion, (183)

"The identical question presented by the pro-
"posed supplemental answer was presented and
"argued to this court on the former appeal, and
"decided adversely to appellants, and is therefore
"*res adjudicata*. That decision became the law
"of the case, and the question cannot be recon-
"sidered on this appeal."

But further: That opinion, as the basis of its obiter remarks concerning the defenses referred to, (183) "The identical question presented by the "proposed supplementary answer was presented and "argued to this court upon the former appeal upon

"that basis only." The gist of the defenses, viz., (1) Bad faith in the prosecution; (2) Oppression of the defendants; (3) That plaintiff had had his full day in court; (4) That not only the wrong remedy was prayed, but the inconsistent causes of action relied upon, and (5) That, in known wrong, the plaintiff had constantly refused to accept full relief, are not only not referred to but necessarily wholly omitted in both the consideratiou given and the reasoning stated in this dictum. Only the matter which was in fact decided on the first appeal is here in any manner considered.

Assignment (10). Denial of the equal protection of the laws.

I think it clearly possible for this clause to be infringed by a state court, through a construction of the laws operating to the advantage of one class and disadvantage of others. Single decisions become precedents, which enlarge by a sort of judicial accretion. Would not a settled practice allowing any creditor holding, or claiming to hold different demands growing out of a single claim or otherwise, but differing as to the amounts legally recoverable thereon, first to prosecute to final judgment that one which promises the largest recovery; then, if that fail to warrant the expected larger recovery, to pro ceed upon another without limit until his list is exhausted, while the debtor is concluded by a single action to determine the sum due, be violative of this provision? The use of capital is ever subject to risk. A lender cannot wholly free himself from this economic rule. Nor may he justly seek to throw all risks pos-

sible including those incident to his own errors, upon his debtor. Yet, by the instant decision this respondent was enabled to accomplish such shift of risk effectively. By his suits he said to plaintiff in error:- "I think I can force you to pay me three thousand "dollars over your contract debt to me. I will com- "pel this by suit to final issue on appeal if need be. "But if I fail in this I will not be the loser. Time "enough then to accept your timely offer of my just "dues. Should you in the meantime presume to re- "sist, I shall force you to pay that sum and all costs." Equality before the law is the object of this Constitutional provision. Is the comparative condition of these parties under the State decision the equality there intended to be guaranteed?

It may be well that a simple citation of Warner vs. Godfrey, 186 U. S. 365 would constitute sufficient authority in this brief, yet possibly the additional matter may not be wholly devoid of aid to the court in its consideration of the case.

In the belief that this judgment of the Supreme Court of the State of Minnesota should be reversed, all the above is respectfully submitted.

J. A. SAWYER,
Attorney for Plaintiffs in Error,
Owatouna, Minnesota.

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FILED
MAR 3 1903
Clerk

JOSEPH A. SAWYER AND NELLIE A. SAWYER,
Plaintiffs in Error,

vs.

DANIEL A. PIPER,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR IN OPPOSITION TO THE MOTION TO DISMISS AND THAT TO AFFIRM.

E. V. CHELLIS AND J. A. SAWYER,
Counsel for Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 225.

JOSEPH A. SAWYER AND NELLIE A. SAWYER,
Plaintiffs in Error,

Against

DANIEL S. PIPER, Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR IN OPPOSITION TO THE MOTION TO DISMISS AND THAT TO AFFIRM.

[Figures enclosed in brackets refer to folios in printed record.]

A full statement of the case will be found in my brief upon the merits. But certain errors contained in the statement of facts in the brief in support of the motion to dismiss or affirm call for correction. Some of the main mistakes are:

(1) That there is no controversy as to the facts. [Brief pages 10 and 23-24.]

(2) That plaintiffs in error remain in possession of the lands. [Brief, page 20, lines 9 to 16.]

(3) That respondent sought in the trial court a foreclosure of the equitable mortgage if denied relief upon the others. [Brief p. 7, lines 21 to 28.]

(4) That plaintiffs in error upon the first appeal asserted a full defense as against any foreclosure of the equitable mortgage. [Brief p. 8, lines 22 to 27.]

(5) That in the petition for modification of opinion and directions on remand plaintiffs in error prayed for an omission of the decision upon the second point made in that appeal. [Brief p. 9 lines 7 to 10. Fo. 78]

(6) That the proposed supplemental answer set up the same matter of election of remedies, as was submitted at the trial and first appeal. [Brief p. 9, lines 15 to 17.]

(7) Certain important facts are wholly omitted. Some of the omissions are:

(1) The foreclosure of the old mortgages would be for a sum $3,000.00 greater than could be had on the equitable mortgage.

(2) Prior to this action respondent brought ejectment to recover all these lands and damages, claiming under the contract and deed, pleading a forfeiture of the contract and all rights thereunder, leaving the deed absolute. They being by the trial court held to be an equitable mortgage, he moved to amend his pleadings and prayer for judgment so as to demand a foreclosure of such mortgage [15 to 17; 115 to 119; 127 to 129.] Immediately followed

by this suit, wherein his real cause of action and remedy were repudiated, and an ~~absolute~~ obsolete one insisted upon in order to force the $3,000 extra to be paid.

(3) From the facts and recitals in the contract it appears that when it was made it was the understanding to allow indefinite time to plaintiffs in error; the lands adjacent to a rapidly growing city and raising in value, would allow a sale of a part only to realize sufficient to pay the entire debt. But sales were rendered impossible by thus involving the lands in bewildering litigation. This accomplished, and the foreclosure sale made including the unwarranted $3000.00, and the sale papers recorded, respondent well supposed himself in a position to sweep the premises into his strong box. But to plaintiffs in error it was of supreme importance to avoid litigation, and get the title in condition to allow sale whereby, during the year allowed in Minnesota they could sell and save, over the sum justly due respondent, something for themselves. (See Stat. Minn. 1894, §6064, providing

> "The mortgagor, or those claiming under "him, shall have one year after the date of the "order of confirmation, in which to redeem the "premises sold, or any seperate portion thereof, "by paying the amount bid therefor, with inter- "est thereon from the day of sale.")

Hence this offer of judgment, desire to avoid litigation and efforts to compromise (88). This record does not show the many efforts made by them for a just settlement nor their unceremonious refusal by

respondent- Nor could this record show the further fact that a second foreclosure sale under the judgment hereunder reviewed was made, confirmed, and the sale papers recorded, and upon the expiration of the period of redemption thereof and more than one year before this writ of error was sued out, respondent ousted plaintiffs in error and has since remained in undisturbed possession of all these lands. Therefore I have procured certified copies of the certificate of sale and writ of possession with the sheriff's return of service thereof such copies filed herewith. No part of this matter was presented or considered at the trial or upon the first appeal.

The statement (3) above that a foreclosure of the equitable mortgage was sought in the trial court is directly contrary to the record. Its then refusal by respondent was unconditional and his whole case, both his proofs and argument, are to the point that the contract was forfeited and the sole existing securities were the old mortgages. See respondent's brief on motion, p. 6, line 30 and p. 7 line 8, and record, fos. 19-20. This position was insisted upon through both courts. The reference at line 28 p. 7, brief, is to a passage in my reply brief below, referring to their claim on appeal, while fully insisting upon the affirmance of the entire judgment, ~~is~~ to the rejected relief ~~if~~ the court held the old mortgages merged. Other of these mistakes and some further omissions may be considered later herein.

ARGUMENT AND AUTHORITIES.

A Federal question is presented.

The defense offered after the first remand did not exist at the time of the trial and the hearing upon the first appeal, and were in no manner then presented or offered. All that did exist and was presented is (1) The claim that under the pleadings and theory of the case a foreclosure of the equitable mortgage would be a departure. (2) Having in the trial court refused to accept the offered judgment for such foreclosure, respondent could not, on appeal, change his position and demand it. ~~No claim of any defense upon the merits, or in a proper action to secure such foreclosure, respondent could not on appeal, change his position and demand it~~. No claim of any defense upon the merits, or in a proper action, to secure such foreclosure was then made. My position is fully stated (1) in statement of Appellants' Positions No. 8 (54) and (2)in my then arguments (62-63 and 67-69). There was no trial after the first remand. Objection was made to the proposed supplemental answer and to all the evidence offered at the ~~pre~~perfunctory hearing, which only was had, upon the sole ground that plaintiffs in error were concluded upon any and all possible defenses by the former decision on appeal and directions to the trial court, (99 and 111-112) and sustained for that reason only (111-112 and 134). In his amended findings, (134) the trial judge states it thus "In ac- "cordance with said decision and judgment of the

"said Supreme court the former findings of this court "are hereby modified and amended as follows:" The proposed answer having been for this reason excluded, it was proper for plaintiffs in error at such preliminary, and practically ex parte hearing to offer to prove the facts constituting the defenses upon which they then relied. These facts are:—

(1) The pleadings and proceedings in the prior action show knowlege both of the law and facts in respondent, and that his insistence upon causes of action based on the old mortgages and the extra $3000 was in bad faith and intended oppression of his debtors. [This matter of the defense of mala fides and oppression did not come too late. The complaint not showing what plaintiff would rely on it was correct practice to offer judgment on the equitable mortgage. The plaintiff repudiating this, there was no opportunity to set up the above facts until after the remand, when it was done.]

(2) That he had persisted in his refusal of relief, based upon the non-enforceability of the equitable mortgage and that all the rights of the plaintiffs in error under that contract were forfeited, until final adverse judgment on appeal.

(3) That prior to the appeal the offer of judgment had been withdrawn.

[4] That by so persisting in relying solely upon his elected causes of action and his repudiation of the other until final adverse judgment upon them, he had elected his remedy and was bound by such election. The offer of full relief made in open court and remaining open and of record until the submission of

the cause, kept open to him the opportunity of full relief throughout the entire trial. His refusal alone prevented a full recovery therein.

[5] By the law against multiplicity of suits and the facts that he had had his "full day in court," that his entire proceeding was oppressive and in bad faith, there arose a defense resting upon the principles of estoppel and res judicata. [As to the validity of these two defenses stated in [4] and [5], see Warner vs. Godfrey 186 U. S. 365; also my main brief and argument.] The fact that a hearing upon these new defenses was denied, is both patent and admitted. That they could not have been earlier offered results both from the fact that they did not then exist, and that by repudiating all claim on that ground respondent deliberately excluded all defenses from presentation or consideration.

The rule in Swafford vs. Templeton, 185 U. S. 487-493, reaffirmed and held applicable in cases of writs of error from state courts in Brown vs. Lite Society [No. 320, Oct. term 1902[23 S. C. R. 123-124, applies here. The basis of jurisdiction here is the claim and admitted fact that plaintiffs in error were denied opportunity to present, and refused consideration of, their alleged defenses. This was no part of the original litigation. It arose after the remand on the first appeal. It is wholly Federal in its character. Whether or not those proffered defenses were good, it was the duty of the state courts to decide in proper and adequate proceedings. [Sec. 5270 Laws of Minnesota, 1894, reads thus; "The plaintiff and defendant, respectively,

"may be allowed, on motion, to make a supplemental "complaint, answer or reply, alleging facts material "to the case, occurring after the former complaint, "answer or reply" Under this statute it was held in Malmsten vs. Berryhill, 63 Minn. I, that the filing of such pleading was matter of right and not of discretion.]

Malmsten vs. Berryhill, 63 Minn. 1

It follows that any consideration of its merits was required to be had in the usual manner, on demurrer or motion. also that plaintiffs in error would have power to amend the answer if it was found defective.]

But while this court, jurisdiction being already vested in it, may examine this record to determine whether the conclusion of the state court is justified, such examination is in the exercise of and not a condtion of jurisdiction.

Kelley vs. Rhoades, 23 S. C. R. 260, No. 93 Oct. Term 1982.
Blythe vs. Hinkley, 180 U. S. 333.

Yet a correct decision therein by the state court could not affect the jurisdiction.

Andrews vs. Andrews, 23 S. C. R. 237, No. 23, Oct. Term 1902.

It was long since settled that a decision by a

state court, that it has not passed upon a Federal question, or had decided one correctly, does not affect either the fact or the extent of the jurisdiction of this court.

McCullough vs. Virginia, 172 U. S. 102.
Columbia Power Co. vs. Columbia Ry. Co. 172 U. S. 475.
Missouri Etc., Ry. Co. vs. Elliott, 184 U. S. 695.

It follows that even were the closing portion of the opinion of the Supreme Court here reviewed not purely obiter it yet would not affect the jurisdiction of this court. It is no more than an attempted justification of the refusals to hear the defenses. But this portion of the opinion (bottom of p. 102 and top of p. 103, record) is only a casual expression of the views of its writer upon a matter not then before the court. That court had already *decided* that the rule of "the law of the case" applied and not only bound the appellants, but the court as well. Its words are "The identical question presented by the "proposed supplemental answer was presented and "argued to this court upon the former appeal, and "decided adversely to appellants, and is therefore, "*res adjudicata*. That decision became the law of "the case, and cannot be reconsidered on this ap- "peal." The rule of "the law of the case" has ever been enforced in Minnesota.

Bradley vs. Norris, 67 Minn. 48.

Teryll vs. Faribault, 84 Minn. 341.

It is also plain that as stated in the opinion the sole parts of the defenses here considered is the matter that was in the record on the first appeal. For a discussion of the claim that the latter portion of the opinion, considered as applicable to the entire defenses presented is yet fatally defective both in assuming as facts matters the record shows have no existence and in omitting from all consideration controlling facts shown by the record, resulting in holding contrary to the settled law of that state, and in its essence still denying due process of law, see my printed argument on file herein, on that topic.

There is absolutely nothing in the brief supporting this motion (p. 17, paragraph 3) that this Federal question was raised too late. The opinion of the State Supreme Court, showing as it does that the refusal to hear these offered defenses by the trial court (based as it is solely on res judicata) was by the Supreme Court affirmed on that precise ground, shows on its face that this Federal question was in fact considered and decided by it. That is sufficient, though the record did not show any further fact.

Meyer vs. City of Richmond, 172, U. S. 82.

Bellingham Bay Co. vs. City of New Whatcom, 172 U. S. 320.

Columbia Power Co. vs. Columbia Ry. Co. 172 U. S. 475.

Chicago Ry. Co. vs. Chicago, 166 U. S. 266, et seq.

Independently of this the statement is untrue. It could not have been set up before the decision on the first appeal. It was set up (1) In the proposed answer (97-98). (2) In assignments of error (2nd appeal) Nos. 7, 8 and 9 (142). (3) In the 5th position as stated in that brief (144 p. 80) [4] In that main brief (153). [5] In the oral argument (209).

The petition for modification of the opinion and the directions, first appeal, is immaterial here.

[1] The rules of that court defining the cases wherein such cases will be considered are quoted in my main brief page 4, and forbid consideration of this petition. Many of the facts relied upon were not in that record (79-80). [2] That Supreme Court is one of appeal. It does not consider matters not passed upon by the trial court. (3) The petition called in question only the correctness of the opinion and direction to the court. This is not ground which that court will consider. See rules, in main brief. (4) The denial of the petition is general. To construe it as intended to pass upon the merits is to presume that all its rules were violated by that court. (5) Upon mere motion for a rehearing that court pays no attention to new matter, (Smith vs. St. Paul, 69 Minn. 276,) and often not too much to that in the record. A ruling therein is not the equivalent of a decision on a matter directly presented upon the appeal. (6) To warrant a dismissal here it *must clearly appear that the state court did in fact properly consider and decide this matter.*

See Life Ins. Co. vs. Brown, 23 S. C. R. at page 124.

It does not so appear here, but at best there is a mere conjecture of some sort of consideration. In its final holding of res judicata that court relies solely upon the original opinion and directions, and the record then before it. There is no reference to this petition or to its denial, both which were filed after that decision was made.

As to the motion to affirm: (1) The claim of delay. The law gives two years in which to sue out a writ of error. No ground for the charge of delay is found in the compliance with this statute. But the attempt calls for further answer. In his complaint in this action (top p. 7, record) respondent alleged that both these plaintiffs in error were insolvent. While that was untrue it is a fact that they were in close circumstances and, as shown above, very desirous to avoid litigation. The latter could only be most disastrous to them in this case, for they desired to save something out of their lands. Succeeding in reversing the judgment which was too large by $3000, but which left the lands so tied up as to make immediate sales, save when made by consent of both parties, difficult if not impossible, they again sought to settle the matters. But with those directions still remaining in that decision it was clear to them that the respondent would do just what in fact he did do, loftily refuse to consider any proposition for settlement. To avoid this, was the object of fil-

ing that petition, and the fact was therein plainly stated. With the failure to obtain the desired modification plaintiffs in error were compelled either to give up everything or carry on the suit. It is admitted in this brief that they then informed counsel that in case a hearing upon their defenses was denied, they intended to put the Federal question thereby raised into this record. It was inserted in the proposed answer, and thereafter continually throughout the proceedings. Now, if counsel and their client were seeking no more than their legal rights, and did not care to leave open a road to this court, they would have made no objection to the proposed answer and defences, but would have had the court formally consider and decide upon them. In that case no writ of error would have been possible. Instead they intelligently resisted, and succeeded in preventing any presentation or consideration of the asserted defenses, thus knowingly and intentionally opening the way whereby plaintiffs in error could remove the case to this court. But with plaintiffs in error the case stood far differently. It was to them then reasonably clear that both state courts would refuse them any hearing. Their sole hope lay in a review by this court. But not from choice, only from necessity, did they wait. The necessary expenses must be procured. Possession of all the lands was taken by respondent—necessity still compelled a further delay of a year. Having full possession, and being at all times informed of the intent to take out this writ, and having knowingly made that possible,

how is respondent prejudiced, even if there were delay?

I think both motions should be denied.

All of which is respectfully submitted.

J. A. SAWYER,

Attorney for Plaintiffs in Error,

Owatouna, Minnesota.

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Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 225.

JOSEPH A. SAWYER AND NELLIE A. SAWYER,
PLAINTIFFS IN ERROR,

VS.

DANIEL S. PIPER,
DEFENDANT IN ERROR.

ARGUMENT BY PLAINTIFF IN ERROR.

H. W. CHILDS AND J. A. SAWYER, - - - Counsel for Plaintiffs in Error.

Supreme Court of the United States.

October Term, 1902.

No. 225.

JOSEPH A. SAWYER and NELLIE A. SAWYER,
Plaintiffs in Error,

Against

DANIEL S. PIPER, Defendant in Error.

ARGUMENT BY PLAINTIFF IN ERROR.

My briefs herein having been of necessity dictated from a sick bed with no opportunity to enter upon investigation save by means of recollection, and that limited by lack of power of mental application consequent upon serious illness, are, I think, much lacking upon several points. It being still doubtful whether my health will allow an oral argument, it seemed well to seek to present in writing certain matters more fully.

Premising, as perhaps sufficiently shown in my briefs, these facts, viz.: The trial court's refusal to hear or consider the offered defenses was based solely upon want of power—that it was concluded

by the opinion and direction of the State Supreme Court. The affirmance of the judgment in the Supreme Court is placed upon the same ground. Their demand was by plaintiffs in error based upon the first clause of the 14th amendment to the Federal constitution, and presented a purely Federal question. That this demand was refused and the asserted Federal right denied by both state courts is patent from the record, and stands admitted. Jurisdiction in this court follows necessarily.

Swafford vs. Templeton, 185 U. S. 487-493.
Equitable Life Society vs. Brown, 23 S. C. R., 123-124 (Dec. 1st, 1902.)

Telegraph Co vs Hardy 162 U.S. 334-5.

But this court will upon the merits examine all the reasons offered in justification of the decision that no Federal rights of these plaintiffs in error had been denied or abridged. That the sole *decision* of that court is its holding of res judicata, is, perhaps sufficiently shown in my briefs. As to the remainder of the opinion it is claimed:

(1) It assumes as material facts matters which the record shows do not exist.

(2) It ignores controlling facts contained in the record.

(3) In effect it materially misstates both the issues and the record.

(4) It is contrary to the well settled law of that state.

(5) It is contrary to and destructive of fundamental principles of law.

(6) As its necessary result, it denied to plaintiffs in error the due process of law guaranteed to them by the Federal constitution.

PRELIMINARY.

The question before the court is "Is the refusal to hear the offered defenses justifiable?" This portion of the opinion is but an attempt to justify such exclusion. Its final decision therefore is for this court.

McCullough vs. Virginia, 172 U. S. 102.
Missouri Ry. Co. vs. Elliott, 184 U. S. 695.

(1) The opinion assumes non-existent facts.

It is predicated upon the assumption that all the parties, by consent, tried the cause in the district court upon the theory that defendants owed to that plaintiff an uncertain sum, upon some one or more of several causes of action which might arise out of the stated facts. Though such causes of action are mutually destructive, yet, by consent they might be submitted together for decision as to which exists, and what the remedy thereon. But this record shows the exact contrary. Though the complaint be somewhat in line with the hypothesis of the court, the course of the trial disproves it. By his refusal to accept the proffered judgment based on the equitable mortgage; by his proofs resting upon the forfeiture of all rights under the contract and the non-existence of that mortgage—proofs indispensible to any recovery upon the old mortgages;

by his insistance upon such refusal and repudiation until final judgment and by his persistence in forcing in this evidence over objection and exception, respondent not only elected to stand solely upon his causes of action based upon the old mortgages, but effectively eliminated the equitable mortgage from the trial. Indeed, these facts are clearly set forth in the judgment of the trial court, viz., (38) "Now, "therefore, on motion of Messrs. Wheelock & Sperry, "and Robert Taylor, attorneys for said plaintiff, it is "hereby adjudged and decreed as follows:

"First. That the said agreement of February "19, 1895, fully set forth in the complaint herein, "and the transaction of which it was a part, did not "and does not extinguish by merger or otherwise "any of the notes and mortgages therein and in the "complaint and findings hereinafter set forth; that "default has been made in the terms and conditions "of said agreement, as in the complaint and findings "receited, and that said agreement and the rights of "the said Joseph A. Sawyer and Nellie A. Sawyer, "thereunder be and they are determined, and have "ceased."

It is also in part stated in the findings, viz., [32] "Tenth. That before the commencement of this ac- "tion the plaintiff did declare to said Sawyer and "his wife the forfeiture by them of their rights under "said agreement by reason of their default in making "said continuous monthly payments."

Indeed, the cornerstone of both judgment and findings is the forfeiture of the contract and non existence of the equitable mortgage. That court ap-

plied all the payments made upon that, to the old mortgages (31.)

(2) Ignores Controlling Record Facts.

Not alone those last above stated are ignored, but the defense of bad faith and oppression, both in the preceding suit and in pressing the demand for the $3000. over the contract amount of all the indebtness, sought through foreclosure of the old mortgages, this being done immediately upon the decision in the ejectment suit that the equitable mortgage did exist, and his futile effort therein to recover upon it. While the motive underlying the prosecution of an actual cause of action is immaterial, not so where one known to be baseless is prosecuted to final issue, with design thereby to oppress and despoil. Such plaintiff during its entire course, openly repudiating his real cause of action and spurning the full relief thereon offered and *open to him throughout.*

(3) Material Matter in the Record Essentially Misstated. Carter v Texas 177 U.S. 443. – 449

(a) The offered defenses. The court thus states them (182 bottom,) "Because plaintiff had brought "his action to foreclose the original mortgages, and "had refused defendant's offer to allow judgment of "foreclosure as to the equitable mortgage his rem- "edy under the latter became lost, and he thereby "estopped himself from asserting any rights there- "under."

This wholly omits the essentials of the real defenses offered and states only a portion of one of the reasons offered on the first appeal why, in that ac-

tion no such foreclosure should be allowed. Indeed, the court directly following the above, states (183),

"The identical question presented by the pro-"posed answer was presented and argued to this "court on the former appeal and is therefore res ad-"judicata."

Again it is stated (183, p. 103);—

"Plaintiff did not waive his rights under the "equitable mortgage, by asking in his complaint "that the original mortgages be foreclosed." This was never questioned. But it is a wholly erroneous statement of our position, upon the first, as well as the second appeal.

The court so far correctly stated that plaintiff's position throughout the entire trial and first appeal, thus:—(183) "Acting on the theory that the new "agreement operated only as a modification of the "contract between the parties as made up by the "mortgages." Had it added "and that by the failure "to pay the equitable mortgage it lost all vitality, "and all defendant's rights under the new agree-"ment instantly perished by the forfeiture," that portion would have been fully stated, but such full statement would but illy comport with the statement [183, p. 103] that the causes of action upon the old mortgages were not inconsistent with that upon the equitable mortgage.

Contrary to the Well Settled Law of that State. (4 and 5)

The practically universally accepted principle of pleading and practice, that, save by consent of the parties, a plaintiff may not unite and try in a single

action several causes of action which are mutually destructive, nor a defendant unite in one answer several such defenses, has long been settled law in Minnesota.

In the Steenerson case, inconsistency was thus defined by the court:—"Separate and distinct defenses "are consistent when both may be true, and only "held inconsistent when proof of one necessarily dis- "proves the other."

Steenerson vs. Waterbury, 52 Minn. 211.

It is apparent that the court did not intend in this action to affect this law. See statement that there is no inconsistency, based on the ground that the original loans and obligations were consistent, and that a single action might have been maintained to recover the entire debt.

The prejudice to these plaintiffs in error resulting from this infraction of the rule is apparent. They were forced either to abandon all defenses and submit to spoliation, or try two actions (on a single demand) throughout the trial and supreme courts of the state, and one of them by writ of error in this court. Multiplicity of suits in its most odious form, coupled with intended oppression and spoliation, is sanctioned by this ruling. To uphold such practice is to open a wide avenue to fraud, sharp practice and over-reaching in courts of justice, while as I think, if the bad faith and oppression could be proven in such case the courts would give prompt relief, the difficulties lie deeper. Proof of the fraud is often not ob-

tainable. Still more often the victim—defendant—is unable to carry on the one-sided fight and submits to extortion from lack of power to resist. Virgil's fable of the Laocoon finds full exemplification in this, —making the temples of justice the secure abiding places of slimy monsters of human passions and greed.

(6) In Essence, a Denial of Due Process of Law.

The settled law in Minnesota requires that an offered supplementary answer be allowed, on due showing, to be filed *as matter of right* unless barred by laches or other defaults.

Malmsten vs. Berryhill, 63 Minn. 1

See Schmidt vs Hager Minn 93 N.W.R 111

Its sufficiency must be tested in the orderly manner by demurrer or motion, either of which allow opportunity for amendment. Here it would have left open to plaintiffs in error their right, by amendments, if needed, to prove their claim of bad faith and oppression. All this appeared, in some form, in their offered answer and evidence. If well founded such defense should most certainly have been sustained, —if ill founded, that fact would appear at the trial, and in either case the litigation would be ended, and full justice meted out to both parties.

Now what was in fact done?

Answer, evidence and all power to present *any defense whatever*, was summarily denied, on the sole ground of res judicata. Any form of trial was also denied, and only a practically ex parte hearing allowed, wherein the court perfunctorily amended its findings and order for judgment, as stated by it, in

form and manner as directed by the Supreme Court. This ruling, and upon this precise ground, was affirmed. The Supreme Court held, not that these facts, but that what was done at the earlier trial and first appeal, afforded ample opportunity to present and have considered, the later proposed defenses, which opportunity was fully availed of. Yet that court states that only the claim that by commencing suit upon the old mortgages and, at the trial, refusing the offered judgment, the plaintiff was estopped to obtain a foreclosure of the other mortgage, in this action. But here is no suggestion of the real offered and excluded defenses, of mala fides, oppression and election of remedies, not at all by bringing the suit, but by repudiating the later sought cause of action and remedy throughout the entire trial and until final judgment.

As I understand the case, this court has held the offered defense sufficient in Warner vs. Godfrey, 186 U. S. 365. That court also has gone far toward, if not established, the recognition of the law and distinctions in election of remedies here contended for. The general doctrine has long been law there. In Wright, Barrett & Co. vs. Robinson, 79 Minn. 272 (decided five months later than this case), which is within the first class of cases, it is held that the election is final and conclusive the instant either of the alternative remedies is adopted. Held further, that it matters not in what form of proceeding it be sought. In Re Receivership Washington Bank 72 Minn. 453, (decided two months earlier than this decision on the first appeal) that in a case within the second

See Rollerson 155 U.S. 13-39

class no controlling election exists prior to the entry of judgment. The court said, "The mere fact that "the assignee brought an action claiming to recover "the merchandise, which was the consideration for "which the notes were given, and dismissed the "action before trial, without having obtained any "relief thereon does not disentitle him to recover the "notes from the bank as a preference."

But to say the least, there was room for serious question *whether or not the defenses offered after the remand were the same as the matter presented and considered before.* Plaintiffs in error *were of right entitled to show in an orderly and adequate proceeding* that they were not the same, and, also, if insufficiently stated or presented to the court, to an opportunity to apply to the court to amend the pleading so as fully to state all their defensive matter. What did they get? Only a summary refusal of any hearing or opportunity whatever. Now, does such summary denial of any hearing constitute due process of law as to this right to show their defenses real and different from the matter previously decided? It was not in the due course of any procedure recognized by the laws of that state, but rather in defiance of such laws. It afforded no adequate or possible opportunity, either for the due and proper presentation, or proper consideration and decision of the defensive matter. It was therefore, wholly lacking in the essential denial of "a day in court" to plaintiffs in error and a denial of due process of law.

Rees vs Waterlown
19 Wall. 123.
Huntington vs
Saidley 176 U.S. 679

Warner vs. Godfrey, 186 U. S. 365.

Pennoyer vs. Neff, 95 U. S. 714-733.

Brown vs New Jersey 175 U.S. 173-175

Justification is wanting for any claim that the rules of law here asserted would unduly restrict the holder of uncertain demands in their prosecution, or the courts in efficient work. Take this case. Had respondent designed no more than a determination by the court as to which of his mortgages was still in force, with a foreclosure thereof, no difficulty need have been met. The underlying facts could have been set forth in his complaint, together with them, and an alternative prayer for relief. Upon the trial all the facts could have been proven, reliance being placed as much upon one as the other. In such case there would be no call for any offer of judgment, but, once made, it would be accepted conditionally upon the finding by the court that the others were non-enforceable. There could be but a single trial; no election of remedies, multiplicity of actions, res judicata or estoppel.

II.

Does not the decision, however made, that the offered defenses were not good, infringe upon the protection guaranteed to plaintiffs in error by the constitutional requirements of equal protection of the laws and of due process of law?

Since no hearing upon them was allowed, all alleged facts offered to be proven must be here consid-

ered as facts in the case. In brief these are: Knowledge in complainant when he commenced this action that his sole existing cause of action was that upon the equitable mortgage; that his insistance upon the old mortgages, with the baseless demand for the extra three thousand dollars, as also his repudiation of the true cause of action and remedy were done in bad faith, and in intentional oppression of plaintiffs in error; that he pressed his chosen action to final issue; that he had throughout that action ample opportunity to recover the entire relief to which he was entitled upon the facts; that the sole reason why he did not obtain his full remedy therein was his refusal to accept it, a refusal persisted in until final judgment; that if later allowed to reverse his course, the inevitable result must be to put plaintiffs in error to the trouble and expense of two trials instead of one (or none had the offer been accepted). And, in effect, to allow the plaintiff to split his cause of action. Even had he then believed his old mortgages valid and the contract forfeited, still by his course he put the entire risk and loss of a double suit upon his adversaries and that without need or reason. No law or rule of practice existed in that state warranting such course. I have endeavored to show above that it is in its nature and effects opposed to the fundamental rights and principles which underlie our system of law, and the national constitution. It necessarily placed that plaintiff and these defendants upon quite different planes of action—conferring upon the former many advantages of which the latter were denied, and tak-

ing from the one what was conferred upon the other placed all the advantages with the complainant and imposing all the disadvantages upon the defendants. This constitutes an arbitrary and uncalled for exercise of power and has long been denounced by this court as a denial both of due process of law, and the equal protection of the laws.

Caldwell vs. Texas, 141 U. S. 209.
See Hurtado vs. California, 110 U. S. 510-535-6,

Wherein this court cited and established the following from Brown vs. Commissioners, 50 Miss. 468: The principle refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. *If any of these are disregarded in the proceedings* by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by due process of law."

In the Caldwell case this court said: "Due pro-"cess is so secured by laws operating on all alike, "and not subjecting the individual to the arbitrary "exercise of the power of government, unrestrained "by the established principles of private right and "distributive justice (citing Bank vs. Oakey, 4 "Wheat. 235-244). The power of the state must "be exerted within the limits of those principles, "and its exertion cannot be sustained when *special, "partial and arbitrary*."

III.

It is respectfully submitted that this case is controlled by that of Warner vs. Godfrey, 186 U. S. 365.

In many particulars absolute identity exists between the two cases. These include a remand with directions to enter a specified judgment—following a decision that no recovery could be had upon the cause of action asserted at the trial; a holding that upon the facts shown upon the trial plaintiff did possess a right of action in the premises and to recover thereon in that action; an order refusing the defendants any opportunity to contest such right of recovery; inconsistency between the two causes of action and a holding upon a later appeal of res judicata; also an offer to the plaintiff, at the trial, of the precise relief later demanded, with a refusal thereof. But on review in this court the judgment was reversed and judgment ordered dismissing the action. This court held:

(1) That in remanding the case to allow the plaintiff to assert a "new and distinct ground of relief constituting a complete departure from the theory upon which the case has been tried," the provision that the case should not be re-opened—thus holding the case open to allow plaintiff to change ground, while closing it against the defendants being heard in defense, resulted in depriving the defendants of all opportunity of defense, and was therefore, a denial of due process of law. Citing Hovey vs. Elliott, 167 U. S. 409.

[2] Since the cause of action first relied upon was "one in substance at war with the theory of the "case propounded against them and which was not made against them" the defendants were justified in not offering evidence upon such claim then repudiated. And that having at the trial in open court offered to the plaintiff the precise relief she demanded later, which offer was refused, thus putting the defendants to the expense of succeeding trials, she was not entitled to any recovery. Action ordered dismissed.

In the Godfrey case it was not questioned but that the plaintiff brought and prosecuted the action in good faith believing she could rightfully recover upon her asserted cause of action. Nor did she then repudiate the other cause of action other than by the fact that the two were inconsistent. There, as here, the record on the first appeal showed the offer, and other facts showing a right to recover upon the other cause of action. In the present case the prosecution of the action was in bad faith. The offer was made at the opening of the case and the omitted cause of action, with the remedy thereon directly and continuously repudiated by the plaintiff. The fact that the Godfrey case came into this court by appeal from a subordinate court is immaterial. Sec. 709 gives this court the same power here as upon appeal, and the gist of that decision was that the defendants had been denied due process of law. While not so distinctly stated yet the same ground appears to exist in support of the ordered dismissal of the action. The points that the amended bill was

not "timely filed" made in the opinion, also that at the trial all the parties treated Warner as the agent of the buyer rather than the seller are not here controlling or even essential. As to the latter, it only appeared that he was so considered, but that matter was then wholly immaterial. As to the former, it is not the basis of the decision. The refusal to allow a defense to be interposed, notwithstanding the direction by the appellate court so to do is the basis of the reversal. The reason for the order of dismissal is thus stated by this court:

"Thus" (by the offer and its rejection) "the de-"fendants were distinctly notified that no adjust-"ment was possible, but that the intention was to "divest them of their property without reimburse-"ment in whole or in part." (Here to extort the extra $3,000 and by its means get the entire property) "The complainant thus having expressly de-"clined to put an end to the litigation, upon the "theory that because of the mala fides of Warner "and Wine she was entitled to an unconditional "recovery of the property, she ought not, in equity, "upon the collapse of her efforts to establish fraud "and bad faith on the part of the defendants, to be "allowed to reform her pleadings and change her "attitude toward the defendants in order to obtain "that which she had expressly elected not to seek, "and had persistently declined to accept."

It does not appear in that case that the offered defense was certainly good, nor that, upon a fair trial it would have been sustained. It did appear that by the decision the plaintiff must lose real es-

tate valued at from $50,000 to $60,000, and for which she received no compensation whatever.

The record here does not show complainant to be remedyless, though he has estopped himself from this relief. It does not appear that he has no other means of recovery, nor is it to be assumed that plaintiffs in error, recovering their property, will be unmindful of the obligation to repay the moneys he advanced.

Complainant having objected to both the supplementary answer and the evidence offered at the perfunctory hearing thereafter, upon the ground that the decision on appeal was res judicata, depriving them of power to present, and the court of right to hear, any defense, and the court having sustained this objection upon that ground, is now estopped to assert that the answer did not sufficiently present the defense intended, and also estopped now to object to consideration of the offered and rejected evidence on the ground that no issue was raised.

Johnson vs. Schuler, 70 Minn. 303.

Schmidt v Hague " 93 N.W.R 110-111

Nor can he now say that as the evidence pleaded and offered did not conclusively show fraud and oppression as actuating him in pressing the suit on the old mortgages it did not go far enough. In either case, had objection been made upon that ground the defect, if any there was, would have then been remedied.

The rule that the decision by a State Supreme Court upon matters of state law and practice binds

this court has no application, where, by means of such decision, a federal right is impaired; hence does not obtain here. If citation of any authorities is permissible in support of this limitation, enough are cited in my briefs.

The fact that the complainant sought to avail himself of the repudiated remedy in the same action, but after final decision therein upon his elected causes of action, is immaterial. It is the substance of the matter of election of remedies and estoppel, not the mere conduit through which they appear in court which controls.

Warner vs. Godfrey 186 U. S. 365.

In the light of the decisions of this court in Swafford vs. Templeton, 185 U. S. 487-493 and the Warner-Godfrey cases, it is submitted that the judgment here in question should at the least be reversed, and all subsequent proceedings vacated.

All of which is respectfully submitted.

J. A. SAWYER,
Attorney for Plaintiffs in Error,
Owatonna, Minnesota.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 225.

JOSEPH A. SAWYER AND NELLIE A. SAWYER,
PLAINTIFFS IN ERROR,

vs.

DANIEL S. PIPER, DEFENDANT IN ERROR.

REPLY AND SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

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This assumption ignores the facts—

(1.) That the complaint was drawn and the action tried and decided below, not only upon an entirely different theory, but upon an inconsistent cause of action.

(2.) That wholly new findings of fact and of law were required.

(3.) A judicial ascertainment of the sum then due upon the equitable mortgage was to be made by the trial court. More than mere calculation since payments made since the trial might be shown.

(4.) A judgment of foreclosure wholly different from that reversed must be rendered and entered.

(5.) Since the defendants had had no opportunity to present any defense to a demand for foreclosure of the equitable mortgage, and also in that some of the defenses originated after that trial, the asserted construction of that decision on appeal violates the constitutional guaranty of due process of law.

Decisions of this court in point here will be found below.

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But all this has been directly decided by this court against the claims made in Great Western Telegraph Co. *vs.* Burnham, 162 U. S., on pages 345 and 346, stated below.

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"Rule well settled and of long standing that a judgment or decree to be final must terminate the litigation between the parties on the merits of the case, so that, if *there should be* an *affirmance* here the court below would have nothing to do but to execute the judgment or decree it had already rendered."

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"Here such is not the case. What remains to be done is NOT *ministerial* but *judicial*" (103 U. S., 520).

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"An appeal may be taken from a *decree* of foreclosure and sale when the rights of the parties have all been settled and nothing remains to be done by the court but to make the sale and pay out the proceeds. The sale in such case is the execution of the decree. But to justify such a sale without consent the amount due upon the debt must be determined. Until this is done the rights of the parties are not all settled. Final process for the collection of the money cannot issue until the amount to be paid or collected by the process if not paid has been adjudged. Such adjudications require the action of the court."

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"So, too, though defendant's cross-bill claiming title was dismissed, reviewable on writ of error from final judgment."

See also Hazeltine *vs.* Central Bank, 183 U. S., 130.

Great Western Telegraph Company *vs.* Burnham, 162 U. S. [339], 346, 347:

"There is nothing in the decisions above cited, or in any other decision of this court, which countenances the position that in Wisconsin or in any other State when the highest court of the State, upon a first appeal, decides a Federal question against the appellant, and remands the case to the inferior court, not merely to carry the judgment into execution, but for further proceedings according to law, and upon further hearing the inferior court renders final judgment against him, he can have that judgment reviewed by this court by writ of error, without first appealing from it to the highest court of the State." * * *

"In the case at bar, as in McComb *vs.* Knox County Commissioners, above cited, the final judgment of the inferior court of the State may have been the necessary result of the previous decision by the Supreme Court of the questions presented for its determination; but it was none the less, on that account, a judgment of the inferior court. As such it was when rendered open to review by the supreme court upon a new appeal, and, for that reason, was not the final 'judgment of the highest court of the State in which a decision in the suit could be had.'"

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"We have held in too many cases, even to justify citation, that a judgment reversing a case and remanding it for a new trial or for further proceedings of a judicial character is totally wanting in the requisite finality required to support a writ of error from this court."

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Also in those actions the plaintiff pays the costs and disbursements of the action, while here they must be and, in fact, were taxed against plaintiffs in error.

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"No suitor is allowed to invoke the aid of the court upon contradictory principles of redress upon one and the same line of facts."

Re Van Norman (41 Minn., 494) and Marshall *vs.* Gilman (52 Minn., 88) are set out and distinguished in my brief in the State court (Record, p. 91; see also National Bank *vs.* Bank of Emporia, 57 Kan., 111, and other cases there fully set forth). It is not unworthy of notice here that Thompson *vs.* Howard, 31 Mich., 311, cited there by me (Record, pp.

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In Schmidt *vs.* Hager (Minn., 1903), 93 N. W. R., 110, 111, the complaint showed on its face that the asserted cause of action was barred by the statute of limitations. But no demurrer was interposed. (A demurrer lies in such cases in that State.) The defense pleaded and sought to be proven on the trial was one of fact. The defendant, on his appeal from an adverse ruling in the trial court, for the first time raised the point that the complaint showed that the action was barred. The supreme court held such defense waived, since defendant proceeded solely upon his defense on the facts until all opportunity for amending the complaint was lost.

In the case at bar the plaintiff proceeded solely upon the cause of action held bad until all opportunity for interposing defenses had passed. In the Hager case the only loss to the plaintiff consequent upon letting in the waived defense would be a reversal and new trial. But here the loss is total and irretrievable. At page 111 of 93 N. W. R. that court said:

"The question, however, here to be decided is not whether the defendants might have availed themselves of the defense of the statute of limitations by demurrer or answer, but it is whether they waived such defense by *answering to the merits and going to trial without raising it until it was too late for plaintiff to amend.*"

I desire to add to the facts stated on page 16 of my main brief, showing the only point presented to the court at the first appeal was that the plaintiff ought not to be allowed a

judgment of foreclosure *in that action*, this passage from the opinion found at folio 110 of record:

"It is argued by defendant's counsel that *in this action* plaintiff is not entitled to a foreclosure of the equitable mortgage."

Also to add to the cases cited on page 19, Robb *vs.* Voss, 155 U. S., 13–39, and Schmidt *vs.* Hager (Minn., 1903), *supra*; also add the case of Telegraph Co. *vs.* Purdy, 162 U. S., 335, to the cases cited at line 20, page 8, of my brief opposing the motion to dismiss.

To the cases cited at bottom of page 29, main brief, add Holden *vs.* Harvey, 169 U. S., 366, wherein, at page 390, this court, by Mr. Justice Brown, said:

"Recognizing the difficulty in defining, with exactness, the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, * * * and that no one shall be condemned in his 'person or property' without an opportunity of being heard in his own defense."

At line 9, page 34, main brief, insert Charles *vs.* City of Marion, 98 Fed. Rep., 166, wherein, at page 168, it is said:

"It is essential to due process of law that there should not only be notice of a time and place for a hearing, but, more important, that there should be a tribunal clothed with power by methods and rules prescribed by law, to hear and determine the question involved."

The fear of submitting unnecessary matter has here been somewhat allayed by the desire to lay before the court all matters of fact and decision which can be pertinent in this cause.

It is respectfully submitted that due process of law, as repeatedly defined in the decisions of this court, has been denied to these plaintiffs in error by the judgments of the State courts, and that the latter should be reversed and all proceedings subsequent to the judgment be vacated and annulled.

J. A. SAWYER,
Attorney for Plaintiffs in Error.

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"The question, however, here to be decided is not whether the defendants might have availed themselves of the defense of the statute of limitations by demurrer or answer, but it is whether they waived such defense by *answering to the merits and going to trial without raising it until it was too late for plaintiff to amend.*"

I desire to add to the facts stated on page 16 of my main brief, showing the only point presented to the court at the first appeal was that the plaintiff ought not to be allowed a

judgment of foreclosure *in that action*, this passage from the opinion found at folio 110 of record:

"It is argued by defendant's counsel that *in this action* plaintiff is not entitled to a foreclosure of the equitable mortgage."

Also to add to the cases cited on page 19, Robb *vs.* Voss, 155 U. S., 13–39, and Schmidt *vs.* Hager (Minn., 1903), *supra;* also add the case of Telegraph Co. *vs.* Purdy, 162 U. S., 335, to the cases cited at line 20, page 8, of my brief opposing the motion to dismiss.

To the cases cited at bottom of page 29, main brief, add Holden *vs.* Harvey, 169 U. S., 366, wherein, at page 390, this court, by Mr. Justice Brown, said:

"Recognizing the difficulty in defining, with exactness, the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, * * * and that no one shall be condemned in his 'person or property' without an opportunity of being heard in his own defense."

At line 9, page 34, main brief, insert Charles *vs.* City of Marion, 98 Fed. Rep., 166, wherein, at page 168, it is said:

"It is essential to due process of law that there should not only be notice of a time and place for a hearing, but, more important, that there should be a tribunal clothed with power by methods and rules prescribed by law, to hear and determine the question involved."

The fear of submitting unnecessary matter has here been somewhat allayed by the desire to lay before the court all matters of fact and decision which can be pertinent in this cause.

It is respectfully submitted that due process of law, as repeatedly defined in the decisions of this court, has been denied to these plaintiffs in error by the judgments of the State courts, and that the latter should be reversed and all proceedings subsequent to the judgment be vacated and annulled.

J. A. SAWYER,
Attorney for Plaintiffs in Error.

In the Supreme Court of the United States.

No. 225.—October Term, 1902.

JOSEPH A. SAWYER and NELLIE A. SAWYER,
Plaintiffs in Error,

Against

DANIEL S. PIPER, Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR, AND MOTION TO AFFIRM.

Comes now the said defendant in error by his counsel, appearing in that behalf, and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the judgment which is by said writ of error brought up to this court for review is the judgment of the Supreme Court of one of the United States; to-wit, the Supreme Court of the State of Minnesota, and does not involve or present any federal question for the consideration of this court, nor did any federal question arise therein for determination, nor was any such federal question properly or seasonably raised or presented in said state court, or decided by it, or necessarily involved or considered therein. This motion is made upon the entire Transcript of Record herein.

And said defendant in error, by his counsel as aforesaid, also moves the court to affirm the said judgment so brought up by said writ of error, if the court shall deem that it has jurisdiction, because, although the record in the cause may

show that the court has jurisdiction in the premises, yet it is manifest that said writ of error was taken for delay only, and because it is also manifest that the question on which the jurisdiction depends is so frivolous as not to need any further argument.

FRANK B. KELLOGG, ROBERT TAYLOR,
WESLEY A. SPERRY and LEWIS L. WHEELOCK,
Counsel for defendant in error for the purposes of these motions.

10

In the Supreme Court of the United States. October Term. 1902. No. 225.

JOSEPH A. SAWYER AND NELLIE A. SAWYER,
Plaintiffs in Error.

Against

DANIEL S. PIPER, Defendant in Error.

20 To H. W. CHILDS and J. A. SAWYER, Esq., Counsel for said Plaintiffs in Error:

Please take notice that on Monday the ninth day of March, A. D. 1903, at the opening of said court on that day, or as soon thereafter as counsel can be heard, at the United States Supreme Court Rooms, in the Capitol, at the City of Washington, in the District of Columbia, the motions of which the foregoing are copies and are herewith served upon you, being a motion to dismiss the writ of error in said cause, for want of jurisdiction, for that no federal question is
30 involved or presented in the record, and also the motion, united therewith, to affirm, on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ of error was taken for delay only, and also because it is manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument, will be submitted to said Supreme Court of the United States for

its decision thereon. Annexed hereto and served herewith is a copy of the brief of argument of said defendant in error to be submitted with said motions in support thereof.

Dated this tenth day of February, A. D. 1903.

Yours respectfully,

FRANK B. KELLOGG, ROBERT TAYLOR,
WESLEY A. SPERRY and LEWIS L. WHEELOCK,
Counsel for defendant in error, for purposes of the said motions.

In the Supreme Court of the United States. October Term, 1902. No. 225.

JOSEPH A. SAWYER AND NELLIE A. SAWYER,
Plaintiffs in Error,

Against

DANIEL S. PIPER, Defendant in Error.

BRIEF OF ARGUMENT OF SAID DEFENDANT IN ERROR, UPON THE FOREGOING MOTIONS.

STATEMENT.

This is an action begun and prosecuted to final judgment in the state courts of the State of Minnesota for the foreclosure of mortgage lien or liens owned and held by said defendant in error (who was plaintiff in the cause in the state court) upon about 790 acres of land of said plaintiffs in error, (who, with one L. C. Woodman, were defendants in that court).

On February 19, 1895, said defendant in error was the owner and holder of three separate mortgages and the debts secured thereby, all given by plaintiffs in error upon said lands and all past due, to-wit; the Woodman debt and mortgage of April 1, 1892; the Deats debt and mortgage of Nov-

ember 1, 1893, and the Piper debt and mortgage of January 23, 1894; aggregating something more than $17,000. And there was also standing against the land another and prior debt and mortgage of $5,000 and considerable past due interest, the principal of which was not then due, given also by plaintiffs in error, designated as the Willis mortgage in the record, and dated July 21, 1890, and payable in five years after its said date. (See Transcript of Record, folios 1 to 8, 14, 15, 18, 19, 20, 27, 28, 29.)

On said February 19, 1895, said plaintiffs in error, as parties of the first part, the defendant in error as party of the second part, and said L. C. Woodman as party of the third part, made and entered into the written agreement of that date set forth in the Record on pages 5 and 6, in folios 9, 10 and 11, the essential provisions of which are as follows: That defendant in error should, and he did, pay and take assignment to himself of all other mortgages on said land, (i. e. of the said Willis mortgage, which was the only other one existing), folio 3, page 2, folio 8, page 4, and folio 18, 19, 31); that plaintiffs in error should convey all said lands by deed to defendant in error (which was done, folio 8, page 5; folio 20, page 11, folios 22 and 23, page 12, and folio 29, page 16); that plaintiffs in error should pay defendant in error thereafter "the full sum of one hundred dollars per month payable "on or before the last day of February, A. D. 1895, and on "or before the last day of each and every month thereafter "continuously." * * * That defendant in error execute and place in escrow in the hands of said Woodman as depositary a warranty deed of said lands running to plaintiffs in error, "to be held in escrow by said Woodman until said "party of the first part" (plaintiffs in error) "shall have paid to "said party of the second part all said monthly payments "above stated and also the sum of twenty thousand and four "hundred dollars ($20,400), said payment of said principal "sum to be made at such time or times as may be determined "by said parties of the first part, they having the privilege of

"paying any sum not less than fifty dollars at any time "thereon: It being agreed and understood that said "parties of the first part shall become entitled to the delivery "to them or their assigns of said deed held by said "third party in escrow as above, at any time whatever, pro- "vided only that they continuously pay said $100 monthly "and also pay said sum of $20,400 in time and manner as "above; and it is further provided that said monthly pay- "ments shall be diminished from and after any payment up- "on said $20,400 in the same proportion which the sum or "sums paid thereon bear to said total sum of $20,400. Pro- "vided further that upon failure by said party of the first part "to pay said monthly payments, all their rights hereunder "shall cease and determine." Some minor provisions of the said contract (which is set out in full in the record at folios 9, 10, 11) are omitted in the above statement thereof, they having no bearing on the questions to be considered. The "escrow deed" was executed and deposited with said Wood- man who accepted it and held it as such depository. (Folio 11,—last part,—and folio 30,—first part.)

Plaintiffs in error made such monthly payments for eleven consecutive months, till December 31, 1895, and then defaulted, and never afterward paid anything. Nothing what- ever was paid on principal. (Folios 12, 14 and 31.)

The complaint sets forth all the facts, all of said debts, notes and mortgages, deeds and contracts, and said entire transaction of February 19, 1895, the assignments of the mortgages, and all the facts in full including the said default, alleges insolvency on the part of plaintiffs in error and that the value of all said lands is less than the amount due in said matter to defendant in error. The prayer is for judgment determing the amount due thereon and for a strict foreclosure of said contract and all said mortgages, unless redemption be made within one year after entry of such judgment by pay- ment of the amount so adjudged to be due; and that said escrow deed be then cancelled: Or, in case the court deem

it inequitable to so adjudge a "strict foreclosure," that said contract and all said mortgages be by and under the judgment of the court foreclosed by sale of said mortgaged premises to satisfy the amount so adjudged to be due; and for such other and further relief as to the court may seem just and equitable. (folio 13.)

The record of the trial in the *nisi prius* court is found on pages 10 and 11 (folios 17 to 20 of the Transcript of Record herein.) There was no dispute as to the facts: The contention between the parties being only upon the question of what is the proper construction and legal effect of said agreement and transaction of February 19, 1895. Plaintiffs in Error contended that it constituted a new and independent, equitable mortgage for the new principal sum of $20,400 and said monthly payments of $100, and that it extinguished entirely by merger all the four original mortgages and the debts secured thereby; while defendant in error contended that it was but a provisional modification of those original securities, waiving the default already made in their terms and saving plaintiffs in error from all default therein so long as they should continuously make the said monthly payments of $100, and giving them an option to pay upon the principal sums, at any time or times and in any sums not less than $50, as might be determined by themselves, and thereby become entitled, upon such payment of said sum of $20,400 and the continuous payment monthly till then of said additional instalments of $100, to a delivery to them of said escrow deed of warranty, which should thereupon, as a matter of course, clear the land in them from all such incumbrances held by defendant in error; that it did not create a new debt of $20,400 payable at all events, or enforceable at any time against plaintiffs in error, either as a personal claim or as an enforceable lien upon the land, but payable only at the option of plaintiffs in error; that so long as they faithfully kept up such monthly instalment payments, their said option continued

good by the terms of the contract, but that by its express terms when they made default in such monthly payments all their rights under said contract ceased and determined, so that a cause of action for the enforcement of the original mortgages and mortgage debts according to the terms thereof arose, because of such default, just as if said contract had never been made, they having credit only for the sums actually paid during such intervening time; that such continnous payment of $100 each month would prevent the arising of any cause of action on said original mortgages and of course would prevent the running of the statute of limitations because no cause of action could arise, against which such limitation could run. Plaintiffs in error on the other hand urged, as an argument in snpport of their contention for the extinguishment of the original securities by merger, that, otherwise, plaintiffs in error could, by the continnous payments of the monthly instalments, prevent the enforcement of the original debts and securities until they should be barred by the running of the statute of limitation. (Folios 18 to 20 inclusive.)

Defendant in error further contended that while he claimed that the contract and transaction of February 19, 1895, did not extinguish by merger the original mortgages and mortgage debts, he was entitled in case the Court should determine otherwise, to a judgment of foreclosure in this action, of the said contract and transaction of February 19, 1895, as an equitable mortgage against the lands for the amount found due thereon. This is disclosed by the brief of plaintiffs in error at folio 67 on page 36.

At the opening of the trial plaintiffs in error offered to allow the defendant in error to take a decree of foreclosure in this action, based upon and for the amount provided in said contract or agreement, which offer was declined by the counsel of defendant in error. This offer and declination was made part of the record by settlement of a case to go to the Supreme Court of the State. See page 10 in folio 17.

The trial court sustained the contention of the defendant in error, holding that said original mortgages were not extinguished by said contract of February 19, 1895, and rendered judgment accordingly, folio 32 and 33.

The plaintiffs in error thereupon moved the trial court for an amendment of its findings of fact and conclusions of law, as set out on pages 19 and 20 of the Transcript of Record, seeking among other things for a determination by the court, as conclusions of law:

First, that said original mortgages were extinguished by merger in said contract as an equitable mortgage (see paragraphs 1 and 2 in folio 36), and that defendant in error had elected at the opening of the trial not to accept said offer for the foreclosure of said contract as an equitable mortgage, and was therefore not entitled to any relief in this action (see subdivision 3 in folio 36) and that the plaintiffs in error were entitled to a judgment that the action be dismissed (see subdivision 4 in folio 37) which motion did not prevail. Plaintiffs in error having appealed the cause to the State Supreme Court, they again argued in that court, first, that said original mortgages were so extinguished by merger (see folios 52 to 62 inclusive) and second, that defendant in error was not entitled to a foreclosure in any event of said equitable mortgage, on the ground that he was bound and estopped by an election to stand for the foreclosure of the original mortgages only, by his said refusal to accept the offer of such foreclosure on the trial. See folios 62 to 64 inclusive, and folios 67 to 70 inclusive.

The first of these contentions was decided by the State Supreme Court in favor of the plaintiffs in error, said court holding that said original mortgages were extinguished by merger, but their said second contention was overruled by the Supreme Court of the State, which held the defendant in error was entitled to a foreclosure of the said contract and transaction of February 19, 1895, as an equitable mortgage for the amount due, according to its terms, and that court

reversed the judgment of the court below and remanded the cause to the trial court, with express directions that that court proceed to determine the amount due upon said equitable mortgage, amend its findings of fact to correspond, and also amend its conclusions of law in accordance with the views of the Appellate Court. See folios 105 to 110.

Thereon the plaintiffs in error petition the Appellate Court for a rehearing and for a modification of its decision, by omitting its said decision against the said second point, which said petition was denied. See folio 78 to 89. The cause having been remanded accordingly, defendant in error moved the trial court for an amendment of its findings of fact and conclusions of law, in accordance with the directions of the said Appellate Court. See folio 101, etc.

The plaintiffs in error moved said court for leave to serve and file a supplemental answer, setting forth said same matter of an alleged election by defendant in error to stand for the foreclosure of the original mortgages only, and certain other matters. See folios 91 to 99 inclusive.

Said motion was denied by the trial court, folio 100. From this decision the plaintiffs in error appealed to the Supreme Court of the State, assigning as error that he had not been permitted to file his supplementary answer, (see Assignments of Error 1, 2 and 3, folios 141 and 142); and also claiming again that the defendant in error had waived all right to foreclose his equitable mortgage. See Assignments of Error 5 and 6, folio 142. The appellants in error were overruled on every point. See decision of Supreme Court, folios 181 to 184. The court says "the identical question presented "by the proposed supplemental answer was presented and "argued to this court on the former appeal and decided ad- "versely to the appellants, and is therefore res adjudicata. "That decision became the law of the case and the "question cannot be re-considered on this appeal. "And besides the cause was remanded to the District Court "on the former appeal with directions to award judg-

"ment of foreclosure as to the equitable mortgage, and that "Court had no alternative but to "comply with that man- "date. But we may remark in passing, that the facts set "up in the proposed answer do not constitute a defense, "and, conceding authority in the court below to permit "it to be interposed, the order rejecting it was proper "for that reason. The doctrine of election of remedies has "no application to the facts of this case. Plaintiff did not "possess two inconsistent remedies for the enforcement of "his rights. He possessed an incumbrance against defend- "ants' property to the amount of $20,400.00 or more, with "but one remedy to enfore the security, which was by fore- "closure of the incumbrance, whether evidenced by the "original mortgages or by the substituted equitable mortgage. "He did not waive his rights under the equitable mortgage by "asking in his complaint—which set out all the facts, both with "the reference to the original and equitable mortgage—that "the original mortgages be foreclosed."

The claim of the plaintiffs in error, reduced to a single proposition is that the court erred in not entirely wiping out an undisputed indebtedness of more than $23,000.00, and giving to the debtor (plaintiffs in error,) a title to the lands in question, free from all liens. There is no controversy about the facts in this case, and has been none from the first. See opinion Supreme Court, folio 181.

ARGUMENT.

I.

The record in this case presents no federal question to be reviewed by this court and hence this court has no jurisdiction.

Assignments of error (1), (2) and (3) of the plaintiffs in error, (folio 201 of the transcript of record,) are mere objections to the ruling of the trial state court on matters of practice. The case had been tried upon the merits and taken

upon appeal from the judgment rendered upon such trial to the State Supreme Court. Plaintiffs in error had contended both in the trial court and in the supreme court that defendant in error by contending that the contract of February 19th, 1895, did not, by merger, extinguish the former mortgages, was estopped from asking a foreclosure of said contract as an equitable mortgage in case his contention against the merger should not be sustained. Upon this point plaintiffs in error were defeated in the State Supreme Court upon that appeal, and that court remanded the cause with specific instructions to the trial court to ascertain the amount due upon said contract as an equitable mortgage (a mere matter of computation by the trial court, since there was no dispute upon the facts) amend its conclusions of law to conform to the decision of the Supreme Court and proceed to judgment of foreclosure of said contract as an equitable mortgage for the amount so found to be due thereon. Thereupon plaintiffs in error petitioned said state Supreme Court for a modification of its said decision by striking out its said decision and specific direction to the trial court, or for a rehearing upon that point, fully urging and arguing their contentions in that matter, and were again overruled by that court. (Folios 78 to 89, inclusive.) Thereupon judgment was entered in the State Supreme Court which finally determined the entire controversy between the parties and the cause was remanded with such specific directions for final judgment by the trial court foreclosing the "equitable mortgage." When the cause came again into the trial court for the action thus specifically directed by the State Supreme Court, appellants made application for the first time for leave to set up said same matter claimed by them to furnish ground of estoppel of defendant in error to claim the foreclosure of the equitable mortgage and a waiver by him of the lien thereof, in and by his so-called supplemental answer (folios 91 to 98 inclusive.) This application was resisted and was denied by the trial court (folios 98 to 100 inclusive.)

Application having been made to the trial court by said defendant in error for the amendment of its findings in accordance with the said judgment of the State Supreme Court and directing entry of judgment of foreclosure of said equitable mortgage, which application came before the trial court for determination at the December term thereof on the 6th of December, 1898, the plaintiffs in error offered in evidence before the trial court certain records in alleged substantiation of the allegations of their said proposed supplemental answer which had been so rejected, which offers were objected to and were excluded by the trial court. (Folios 111 to 133 inclusive). This action of the trial court denying the application to file said supplemental answer and rejecting said offers of evidence to sustain the same is what is presented to this court as error by said assignments numbers (1), (2) and (3.)

It must be manifest that the trial court was right because (1), it must be apparent upon inspection that the proposed supplemental answers (folios 96 to 98) does not state any defense whatever; (2), that there is no supplemental matter set out therein; (3), that if it had presented a valid defense plaintiffs in error were too late in making application to file the same, having first submitted the same defense there sought to be interposed, and urged the same ground upon the trial of the cause in the *nisi prius* court, set it out in their settled case for the purpose of appeal to the Supreme Court (folios 17 and 18), tried it again before the Supreme Court of the State where they were defeated and moved there for a rehearing thereon and were again defeated; (4), the case having been thus remanded with specific directions that the trial court proceed to judgment as directed by the Supreme Court and not for a new trial, the trial court had no power to permit the filing of the so-called supplemental answer or to hear evidence to sustain the same.

That the trial court was right in these rulings was distinctly decided by the state Supreme Court on the second ap-

peal to that court by the plaintiffs in error. (Folios 181 to 183 inclusive.)

It is manifest that by the assignments of error in this court numbered from (1) to (8), (folios 201 and 202,) plaintiffs in error are merely calling in question the soundness of the decisions of said state courts upon those questions of general law which clearly present no federal question whatever.

By the 9th, 10th and 11th assignments of error the plaintiffs in error attempt to raise and to point out in the record as federal questions the claims that by such denial of their application to file said supplemental answer and make proofs thereunder they were denied a hearing thereon in the State court, and that therefore they were being deprived of their property without due process of law, and were also denied the equal protection of the laws. In this manner only is there even sought to be pointed out in this record any federal question whatever.

Now we remark:

1st. That plaintiffs in error are wholly mistaken in their assertion as a matter of fact that they were deprived of a hearing upon that question. They were accorded a full hearing upon all the questions attempted to be presented by that proposed supplemental answer, both upon the initial trial of the cause, upon the trial of the first appeal to the Supreme Court of the State and the application for a rehearing thereon in that court; so that they had their day in court upon all those questions. They were again heard upon the application itself to file the proposed supplemental answer and the application was denied upon a full and fair hearing, and rightfully denied. They were again heard upon that same application, and also upon the questions sought to be presented thereby, on the second appeal to the State Supreme Court. The questions thus passed upon, and upon which the plaintiffs in error were thus fully heard, were in no sense federal questions.

The mere assertion by plaintiffs in error, as set forth

first in their proposed supplemental answer, and as now asserted in their 9th, 10th and 11th assignments of error, that, by a refusal of the court to allow said supplemental answer and to permit them to retry those questions thereunder, they were deprived of their property without due process of law or were denied the equal protection of the laws, does not in any manner present a federal question to this court in fact. The mere averment of the existence of a federal question, or the simple averment that a party is deprived of his property without due process of law, or is denied the equal protection of the laws, is not in all cases sufficient. This court has no jurisdiction of a writ of error to review the judgments of State courts unless a real, and not a fictitious, federal questions is involved.

Hamblin v. Western Land Co., 147 U. S. 531.

As was said by this court in the case of the City of New Orleans v. New Orleans Waterworks Co., 142 U. S. 79, 87, "The bare averment of a federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay."

See also Millingar v. Hartupee, 6 Wall 258.

Plaintiffs in error in their proposed supplemental answer allege that, at the beginning of the trial of the action, they in open court offered to allow judgment to be taken foreclosing the said equitable mortgage for the amount due thereon, which offer was declined; all of which facts appeared fully in the record and were fully considered at the said trial, were a part of the record and fully considered at the hearing on the appeal to the Supreme Court, were urged by plaintiffs in error as grounds to defeat defendant in error from obtaining

judgment of such foreclosure, and their contention thereon was after full hearing overruled by the Supreme Court. Plaintiffs in error further allege in said supplemental answer that any judgment in favor of defendant in error foreclosing the lien for any sum whatever would abridge the privileges and immunities of plaintiffs in error and would deprive them of property without due process of law and deny to them the equal protection of the laws. But we submit that this allegation is a mere statement of a proposed proposition of law and not of any fact, supplementary or otherwise, and we further submit that as a proposition of law it is not true in fact. They further allege in this supplemental answer, in paragraph 3, that the defendant in error has waived the lien of the equitable mortgage and precluded himself from attempting to enforce the same and from seeking any foreclosure thereof. But we submit that this is a mere statement of a conclusion of law and not of any fact, and that it is intended for what would be a mere reiteration of the claim set up in the other allegation, that on the trial defendant had declined the offer of plaintiffs in error of judgment of such foreclosure. In this supplemental answer plaintiffs in error further make certain allegations by way of enlargement upon the allegations contained in the original answer in its third sub-division (folios 15 and 16) and also in the second sub-division of the reply to said original answer (folios 16 and 17). But we submit that none of these allegations presents any supplemental allegations whatever nor any matters of defense whatever. The same action and the proceedings therein were set forth in the original answer by way of a plea in abatement of a former action pending; but that plea was abandoned at the trial, or at least was in no manner urged (folios 17 to 20); and there certainly can be no reasonable grounds upon which plaintiffs in error could have been allowed to have again set them up for that or for any other purpose after the issues had been determined upon their merits and final judgment ordered by the Supreme Court of the State.

It was therefore right and proper upon these considerations alone that the application to file said supplemental answer was denied, and it is not true that the plaintiffs in error were on that account deprived of property without due process of law or denied the equal protection of the laws. The supposed federal question therefore thus averred by plaintiffs in error is not a real but a fictitious federal question.

2nd. The judgment of the State Supreme Court, a review of which is sought by means of the writ of error herein, did not in any manner determine any federal question whatever, nor was the determination of any federal question necessarily involved therein.

We call the attention of the court to the decision of the State Supreme Court itself (folios 181 to 184). The substance of that decision is, first, that the identical question presented by the proposed supplemental answer was presented, argued and determined in the first appeal to that court and was therefore res adjudicata; second, that the cause was remanded on the former appeal with specific directions to award judgment of foreclosure of the equitable mortgage, and that therefore the trial court had no alternative but to comply with the mandate, and could not allow the supplemental answer and proceed to another trial; and third, that that court, considering again the contentions of plaintiffs in error respecting the alleged estoppel of defendant in error by an election as between inconsistent remedies, decided as a proposition of general law that the doctrine of election of remedies has no application to the facts of the case, and that defendant in error had not waived his rights under the equitable mortgage by his contention for a foreclosure of the lien of the original mortgages. Now even supposing it could be contended that the Supreme Court determined against them, the alleged federal question sought to be raised by plaintiffs in error, it is clear that that judgment was not based upon such adverse determination of such federal question and that

a decision thereof was not necessary to the determination of the cause.

The rule is settled that to give this court jurisdiction of a writ of error to a State court it must appear affirmatively, not only that a federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary for the determination of the cause and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

DeSausure v. Gaillard, 127 U. S. 216.
Johnson v. Risk, 137 U. S. 300.
Cook County v. Calumet & C. Canal & Dock Co., 138 U. S. 635.
Haley v. Breeze, 144 U. S. 130.

3rd. Even the averment of the alleged federal question in this cause was made entirely too late. This court will not consider such question, nor entertain jurisdiction of the writ of error to the State Court to review its decisions unless the federal question was distinctly raised and presented to that court *in due time*, so that it shall be regularly and properly passed upon by it, in the due progress of the proceedings. In this cause plaintiffs did not in any manner present or aver the question of their being deprived of property without due process of law, or of their being denied equal protection of the laws, or any other form of federal question, until the cause had been fully determined on its merits, including the questions of estoppel, and waiver of the lien of the "equitable mortgage" and the right of defendant in error to a judgment of foreclosure thereof in this action, and was remanded to the trial court with specific instructions for entry of final judgment. As was rightly decided by the State Supreme court on the second appeal, the trial court had then no power to allow the filing of the supplemental answer, and could do

no otherwise than to obey the mandate of the appellate court. If the question thus attempted to be raised by plaintiffs in error could be held to be a real federal question it was entirely too late to then raise it.

Bushnell v. Crooke Mining & Smelting Co., 148 U. S. 682.
Loeber v. Schroeder, 149 U. S. 580.
Texas & P. Ry. Co. v. So. Pac. Ry. Co., 137 U. S. 48.
Sayward v. Denny, 158 U. S. 180.

II.

If the court should hold that it had jurisdiction or color of jurisdiction of the writ of error in this cause defendants in error are entitled to an affirmance of the judgment of the court below under Rule 6 of this court. Defendant in error under Section 5 of Rule 6 has united with the motion to dismiss, a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ of error was taken for delay only; and also that the question on which the jurisdiction depends is so frivolous as not to need further argument.

1st. We think this record shows clearly that the plaintiffs in error have taken this writ of error for the mere purpose of delay. All the questions under dispute by the parties, and especially the question, so tenaciously disputed by these plaintiffs in error, as to whether defendant in error was precluded by estoppel or otherwise from claiming a foreclosure of the equitable mortgage, were fully and fairly considered and determined in the trial court and in the State Supreme Court upon the first appeal, no federal question being then in any manner before the court.

The State Supreme Court having rendered its decision specifically directing the trial court to render judgment for

foreclosure of the equitable mortgage, plaintiffs in error first exhibit their desire to delay in their petition for a rehearing (folios 87, 88), where they use this language, addressed to the Supreme Court of the State, to-wit: "I think it proper for me to state, in presenting this motion, that I greatly prefer not to present or press this matter. But since the portion of the order here objected to will in all probability prevent any just settlement of the matter between the parties, unless at very great sacrifice, and since I feel confident that if that be stricken out and the matter left for future consideration, such settlement will be readily made, whereby each party will receive his moral dues and there will remain no occasion for any further consideration by the court, I have decided to present the matter."

Now what other consideration or expectation could have been in the minds of plaintiffs in error when penning this language in a petition addressed to the State Court praying that there be stricken out of its decision the determination that defendant was entitled to judgment of foreclosure of the equitable mortgage in this action and the specific direction to the trial court to that end, except that he might thereby prolong the litigation to the discouragement of the defendant in error and thereby secure an advantageous settlement of the case.

Failing in that and the case having been remanded for the amendment of the findings of the trial court and the entry of final judgment, plaintiffs in error next make application to the trial court for leave to file a supplemental answer which clearly presents no defense whatever and seeks only to relitigate the same questions which had already been determined upon full hearing: questions which had become res adjudicata as between the parties in this very suit. We think it clear that there could have been no purpose in making that application except the purpose to prolong the litigation and delay the result.

Evidently expecting to fail in that application plaintiffs in error make an averment in that supplemental answer that if it be not granted any judgment rendered against them would be treated as depriving them of property without due process of law and denying them equal rights as citizens under the laws:—evidently looking forward to a writ of error to the Supreme Court of the United States as a means of further delay and prolonging of the litigation.

Let it be remembered that this was an action to foreclose a lien for a considerable amount upon a large tract of land constituting an improved farm in the possession of the plaintiffs in error; and it would seem certain that so long as the litigation looking to such foreclosure could be prolonged plaintiffs would continue to reap the advantage of such possession and secure to themselves the rents and profits of the land. A case was therefore settled upon the application of plaintiffs in error making up a record not merely for the Supreme Court of the State, but presenting, as plaintiffs in error evidently considered, a record which would carry a federal question, under a writ of error, to the Supreme Court of the United States; and thus further prolong and delay the controversy. Being defeated in the State Supreme Court, and judgment having been entered in that court affirming the judgment of the trial court, which judgment of affirmance bears date December 15, 1899, plaintiffs in error deliberately wait until until the two years allowed in which to take a writ of error from this court to the State court to bring that judgment up for review, and then sue out the present writ of error.

From all this which appears in the record we think it manifest that this writ of error was taken for the purpose of delay only.

2nd. We further contend that in the present cause the question on which the jurisdiction of this court depends, (if such jurisdiction exists), is so frivolous as not to need further

argument, and that such question was rightly decided in the State Court, and that therefore it is unnecessary to keep the case in this court for further argument.

Spies v. Illinois, 123 U. S. 131.
Church v. Kelsey, 121 U. S. 282.
Arrowsmith v. Harmoning, 118 U. S. 194.

Dated February 10th, 1903.

Respectfully submitted,

F. B. KELLOGG, ROBERT TAYLOR,
W. A. SPERRY and L. L. WHEELOCK,
Counsel for Defendant in Error.

DEFENDANT'S BRIEF

In the Supreme Court of the United States.

No. 225.—October Term; 1902.

JOSEPH A. SAWYER and NELLIE A. SAWYER,
Plaintiffs in Error,

Against

DANIEL S. PIPER, Defendant in Error.

BRIEF OF ARGUMENT OF DEFENDANT IN ERROR.

STATEMENT.

This is an action begun and prosecuted to final jndgment in the state courts of the state of Minnesota for the foreclosure of mortgage lien or liens owned and held by said defendant in error (who was plaintiff in the cause in the State court) upon about 790 acres of land of said plaintiffs in error, (who, with one L. C. Woodman, were defendants in that court.)

On February 19, 1895, said defendant in error was the owner and holder of three separate mortgages and the debts secured thereby, all given by plaintiffs in error upon said lands and all past due, to-wit: the Woodman debt and mortgage of April 1, 1892; the Deats debt and mortgage of November 1. 1893, and the Piper debt and mortgage of January 23, 1894; aggregating something more than $17,000. And there was also standing against the land another and prior debt and mortgage of $5,000 and considerable past due interest, the principal of which was not then due, given also by plain-

tiffs in error, designated as the Willis mortgage in the record, and dated July 21, 1890, and payable in five years after its said date. (See Transcrips of Record, folios 1 to 8, 14, 15, 18, 19, 20, 27, 28, 29.)

On said February 19, 1895, said plaintiffs in error, as parties of the first part, the defendant in error as party of the second part and said L. C. Woodman as party of the third part made and entered into the written agreement of that date set forth in the Record on pages 5 and 6, in folios 9, 10 and 11, the essential provisions of which are as follows: That defendant in error should, and he did, pay and take assignment to himself of all other mortgages on said land (i. e. of the said Willis mortgage, which was the only other one existing) (folio 3, page 2, folio 8, page 4, and folios 18, 19, 31); that plaintiffs in error should convey all said lands by deed to defendant in error (which was done, folio 8, page 5, folio 20, page 11, folios 22 and 23, page 12, and folio 29, page 16); that plaintiffs in in error should pay defendant in error thereafter "the full sum of one hundred dollars per 20 "month payable on or before the last day of February, A. D. "1895, and on or before the last day of each and every month "thereafter continuously." * * * That defendant in error execute and place in escrow in the hands of said Woodman as depository a warranty deed of said lands running to plaintiffs in error, "to be held in escrow by said Woodman "until said party of the first part" (plaintiffs in error) "shall "have paid to said party of the second part all said monthly "payments above stated and also the sum of twenty thousand "and four hundred dollars ($20,400) said payment of said "principal sum to be made at such time or times as may be 30 "determined by said parties of the first part, they having the "privilege of paying any sum not less than fifty dollars at any "time thereon: It being agreed and understood that said "parties of the first part shall become entitled to the de- "livery to them or their assigns of said deed held by said "third party in escrow as above, at any time whatever pro-

"vided only that they continuously pay said $100 monthly "and also pay said sum of $20,400 in time and manner as "above; and it is further provided that said monthly pay- "ments shall be diminished from and after any payment upon "said $20,400 in the same proportion which the sum or sums "paid thereon bear to said total sum of $20,400. Provided, "further, that upon failure by said party of the first part to "pay said monthly payments, all their rights hereunder shall "cease and determine." Some minor provisions of the said "contract (which is set out in full in the Record at folios 9, 10 10, 11) are omitted in the above statement thereof, they having no bearing on the questions to be considered. The "escrow deed" was executed and deposited with said Wood- man who accepted it and held it as such depository. (Folio 11, last part, and folio 30, first part.)

Plaintiffs in error made such monthly payments for eleven consecutive months, till December 31, 1895, and then de- faulted, and never afterward paid anything. Nothing what- ever was paid on the principal. (Folios 12, 14 and 31.)

The complaint sets forth all the facts, all of said debts, 20 notes and mortgages, deeds and contracts, and said entire transaction of February 19, 1895, the assignments of the mortgages, and all the facts in full including the said default, alleges insolvency on the part of plaintiffs in error and that the value of all said lands is less than the amount due in said matter to defendant in error. The prayer is for judgment determining the amount due thereon and for a strict fore- closure of said contract and all said mortgages, unless redemp- tion be made within one year after entry of such judgment by payment of the amount so adjudged to be due; and that said 30 escrow deed be then cancelled; or, in case the court deem it inequitable to so adjudge a "strict foreclosure," that said con- tract and all said mortgages be, by and under the judgment of the court foreclosed, by sale of said mortgaged premises to satisfy the amount so adjudged to be due; and for such other

and further relief as to the court may seem just and equitable. (Folio 13.)

The record of the trial in the *nisi prius* court is found on pages 10 and 11 (folios 17 to 20 of the Transcript of Record herein). There was no dispute as to the facts: The contention between the parties being only upon the question of what is the proper construction and legal effect of said agreement and transaction of February 19, 1895. Plaintiffs in error contended that it constituted a new and independent, equitable mortgage for the new principal sum of $20,400 and said monthly payments of $100, and that it extinguished entirely by merger all the four original mortgages and the debts secured thereby, while defendant in error contended that it was but a provisional modification of those original securities, waiving the default already made in their terms and saving plaintiffs in error from all default therein so long as they should continuously make the said monthly payments of $100, and giving them an option to pay upon the principal sums, at any time or times and in any sums not less than $50, as might be determined by themselves, and thereby become entitled, upon such payment of said sum of $20,400 and the continuous payment monthly till then of said additional instalments of $100, to a delivery to them of said escrow deed of warranty, which should thereupon, as a matter of course, clear the land in them from all such incumbrances held by defendant in error; that it did not create a new debt of $20,400 payable at all events, or enforcible at any time against plaintiffs in error, either as a personal claim or as an enforcible lien upon the land, but payable only at the option of plaintiffs in error; that so long as they faithfully kept up such monthly instalment payments, their said option continued good by the terms of the contract, but that by its express terms when they made default in such monthly payments all their rights under said contract ceased and determined, so that a cause of action for the enforcement of the original mortgages and mortgage debts according to the terms thereof

arose, because of such default, just as if said contract had never been made, they having credit only for the sums actually paid during such intervening time; that such continuous payment of $100 each month would prevent the arising of any cause of action on said original mortgages and of course would prevent the running of the statute of limitations because no cause of action could arise, against which such limitation could run. Plaintiffs in error on the other hand urged, as an argument in support of their contention for the extinguishment of the original securities by merger, that, otherwise, plaintiffs in error could by the continuous payments of the monthly instalments prevent the enforcement of the original debts and securities until they should be barred by the running of the statute of limitation. (Folios 18 to 20 inclusive.)

Defendant in error further contended that while he claimed that the contract and transaction of February 19, 1895, did not extinguish by merger the original mortgages and mortgage debts, he was entitled in case the court should determine otherwise, to a judgment of foreclosure in this action, of the said contract and transaction of February 19, 1895, as an equitable mortgage against the lands for the amount found due thereon. This is disclosed by the brief of plaintiffs in error at folio 67 on page 36.

At the opening of the trial plaintiffs in error offered to allow the defendant in error to take a decree of foreclosure in this action, based upon and for the amount provided in said contract or agreement, which offer was declined by the counsel of defendant in error. This offer and declination was made part of the record by settlement of a case to go to the Supreme Court of the State. (See page 10 in folio 17.) The trial court sustained the contention of the defendant in error, holding that said original mortgages were not extinguished by said contract of February 19, 1895, and rendered judgment accordingly. (Folios 32 and 33.)

The plaintiffs in error thereupon moved the trial court for an amendment of its findings of fact and conclusions of

law, as set out in pages 19 and 20 of the transcript of record, seeking among other things for a determination by the court, as conclusions of law:

First, that said original mortgages were extinguished by merger in said contract as an equitable mortgage, (see paragraphs 1 and 2 in folio 36) and that defendant in error had elected at the opening of the trial not to accept said offer for the foreclosure of said contract as an equitable mortgage, and was therefore not entitled to any relief in this action, (see sub-division 3 in folio 36) and that the plaintiffs in error were entitled to a judgment that the action be dismissed, (see sub-division 4 in folio 37] which motion did not prevail. Plaintiffs in error having appealed the cause to the State Supreme Court, they again argued in that court, first, that said original mortgages were so extinguished by merger, (see folios 52 to 62 inclusive), and second, that defendant in error was not entitled to a foreclosure in any event of said equitable mortgage, on the ground that he was bound and estopped by an election to stand for the foreclosure of the original mortgages only, by his said refusal to accept the offer of such foreclosure on the trial. (See folios 62 to 64 inclusive, and folios 67 to 70 inclusive.)

The first of these contentions was decided by the State Supreme Court in favor of the plaintiffs in error, said court holding that said original mortgages were extinguished by merger, but their said second contention was overruled by the Supreme Court of the State, which held the defendant in error was entitled to a foreclosure of the said contract and transaction of February 19, 1895, as an equitable mortgage for the amount due, according to its terms, and that court reversed the judgment of the court below and remanded the cause to the trial court, with express directions that that court proceed to determine the amount due upon said equitable mortgage, amend its findings of fact to correspond, and also amend its conclusions of law in accordance with the views of the appellate court. (See folios 105 to 110.)

Thereon the plaintiffs in error petitioned the appellate court for a rehearing and for a modification of its decision, by

omitting its said decision against the said second point, which said petition was denied. (See folios 78 to 89.) The cause having been remanded accordingly, defendant in error moved the trial court for an amendment of its findings of fact and conclusions of law, in accordance with the directions of the said appellate court. (See folios 101, etc.)

The plaintiffs in error moved said court for leave to serve and file a supplemental answer, setting forth said same matter of an alleged election by defendant in error to stand for the foreclosure of the original mortgages only, and certain other matters. (See folios 91 to 99 inclusive.)

Said motion was denied by the trial court, (folio 100). From this decision the plaintiffs in error appealed to the Supreme Court of the State, assigning as error that he had not been permitted to file his supplementary answer, (see Assignments of Error 1, 2 and 3, folios 141 and 142), and also claiming again that the defendant in error had waived all right to foreclose his equitable mortgage. (See Assignments of Error 5 and 6, folio 142.) The appellants in error were overruled on every point. (See decision of Supreme Court, folios 181 to 184.) The court says "the identical question presented by "the proposed supplemental answer was presented and argued "to this court on the former appeal and decided adversely to "the appellants, and is therefore *res adjudicata*. That decision "became the law of the case and the question cannot be re-"considered on this appeal. And besides, the cause was "remanded to the district court on the former appeal with "directions to award judgment of foreclosure as to the equita-"ble mortgage, and that court had no alternative but to com-"ply with that mandate. But we may remark in passing, that "the facts set up in the proposed answer do not constitute a "defense, and, conceding authority in the court below to per-"mit it to be interposed, the order rejecting it was proper for "that reason. The doctrine of election of remedies has no "application to the facts of this case. Plaintiff did not possess "two inconsistent remedies for the enforcement of his rights. "He possessed an incumbrance against defendant's property "to the amount of $20,400.00 or more, with but one remedy

"to enforce the security, which was by foreclosure of the in-
"cumbrance, whether evidenced by the original mortgages or
"by the substituted equitable mortgage. He did not waive
"his rights under the equitable mortgage by asking in his
"complaint—which set out all the facts, both with refer-
"ence to the original and equitable mortgage—that the origi-
"nal mortgages be foreclosed."

The claim of the plaintiffs in error, reduced to a single proposition, is that the court erred in not entirely wiping out an undisputed indebtedness of more than $23,000.00, and giving to the debtor, (plaintiffs in error), a title to the lands in question, free from all liens. There is no controversy about the facts in this case, and has been none from the first. (See opinion Supreme Court, folio 181.)

At the time of our making this brief we have not seen the brief of the plaintiffs in error, nor their statement of the case; hence we make the foregoing statement thereof on behalf of defendant in error.

ARGUMENT.

Defendant in error has already made and submitted motions to dismiss the writ of error, for want of jurisdiction of this court, because the Record presents no federal question, and to affirm, in case the court shall deem that it has jurisdiction, on the grounds that, although the record may show such jurisdiction, it is manifest that the writ of error was taken for delay only, and also that it is manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument; and have submitted our Brief of Argument upon said motions.

Being informed that this cause is likely to be reached by the court, very soon in its regular order, on the merits, and that the court may therefore postpone the hearing and consideration of said motions till the hearing on the merits, we

beg leave here to repeat, in few words, the points presented in that Brief so made and submitted upon the said motions to dismiss and to affirm.

I.

The record presents no federal question to be reviewed by this court, and hence this court has no jurisdiction.

As we have stated, there is no dispute at all upon the facts. In all the courts, there have been only two questions of law up for determination, both clearly presented by the pleadings, as has been held by the State courts, to-wit: First, Are the four original mortgages given by the plaintiffs in error and held by defendant in error (described at folios 1 to 8 inclusive) extinguished by merger into the subsequent agreement and transaction of February 19th, 1895, (set forth in folios 8 to 12 inclusive), leaving the latter to stand as an equitable mortgage, the only lien to be enforced by foreclosure; and, second, if so, is the defendant entitled to a judgment foreclosing the lien of such substituted equitable mortgage, in this action, in view of the fact that on the trial plaintiffs in error offered to allow defendant in error to take such judgment of foreclosure of such equitable mortgage, which offer defendant in error declined, he contending that such merger was not affected by the said transaction and contract, and that he was entitled to a judgment of foreclosure for the larger amount secured by the said four original mortgages.

The first of these questions, although decided by the trial court in favor of the contention of defendant in error, was upon the first appeal to the State Supreme Court, decided in accordance with the contention of plaintiffs in error, and was thus eliminated from the case.

The plaintiffs in error, upon the said second question, contended that defendant in error had, by his unsuccessful contention against such merger of the original mortgages and

his refusal upon the trial to accept their offer of judgment for foreclosure of the equitable mortgage, waived and lost his lien under the equitable mortgage, and his right to a foreclosure thereof. This point was clearly raised by plaintiffs in error themselves, was fully urged, argued and submitted to the State court, being distinctly set forth in the Record in that court, and was decided by the State Supreme Court in its judgment and decision on the 15th day of August, 1898, more than three years prior to the application of plaintiffs in error for the writ of error herein, which judgment and decision of said State Supreme Court was adverse to such contention of plaintiffs in error, and was final, in that it determined the cause on the merits, and, while it reversed the judgment of the trial court directing foreclosure for the amount secured by the said four original mortgages, it remanded the cause with specific directions to the trial court to find (compute) the amount due on the said equitable mortgage and proceed to judgment for its foreclosure. No new trial or retrial was granted, and nothing remained to be done, or could be done, except to ascertain the amount due upon the equitable mortgage, a mere matter of computation, all the facts being undisputed, and to proceed to foreclose therefor. Plaintiffs petitioned the State Supreme Court for a re-hearing upon this same question which was denied. The cause having been remanded with such specific directions, plaintiffs moved the trial court for leave to set up again by supplemental answer the same matters so already in the Record and so tried and determined, and sought to retry the same question; despite the former adjudication thereof, asserting in his proposed supplemental answer that any judgment in favor of defendant in error, foreclosing said lien for any sum whatever would abridge the privileges and immunities of plaintiffs in error, as citizens of the United States, and would deprive them of property without due process of law, and would deny them the equal protection of the laws. (Folio 97).

It is only in this manner, and by this proposed "supple-

mental" answer that plaintiffs seek to raise and carry into this record a federal question for review.

Their motion being denied, as also their offer of certain evidence as if to prove the allegations of such supplemental answer, and judgment having been entered according to the said specific direction of the State Supreme Court, a second appeal was taken by plaintiffs to that court, on which appeal the same question was again vigorously urged and argued by plaintiffs in error, notwithstanding the former adjudication thereof, to-wit, the question whether defendant in error, by his refusal to accept their said offer of judgment foreclosing the lien of said equitable mortgage, made at the opening of the original trial, (folio 17, at top of page 10), and by contending for a foreclosure for the larger sum secured by the four original mortgages, did thereby waive and lose his lien under the equitable mortgage.

The Supreme Court of the State, after giving full hearing to all their arguments and contentions, decided against them, holding that the question had been fully submitted, heard, and decided against them on the first appeal, and was *res adjudicata*, and that the trial court was right in its overruling of their motion for leave to file their proposed supplemental answer, etc., both because the trial court could not do otherwise than to obey the specific instructions of the appellate court, and because the proposed supplemental answer did not set forth any defense. Judgment was rendered affirming the judgment of the trial court. Thereupon, almost two years after the entry of this judgment of affirmance, plaintiffs in error sued out this writ of error.

Now, we submit, that this record presents no federal question at all. Plaintiffs in error are wholly mistaken in their contention that they were deprived of a hearing upon this question. We think this so manifest from the entire record, as to require no argument. (See, in the record of the trial, folio 17 on page 10 of the Transcript of Recod, in the motion of plaintiffs in error for amended findings of law

and fact, subdivisions III and IV, on page 20; in the brief of plaintiffs in error on appeal to the State Supreme Court, subdivision VIII, page 30, folio 54; subdivision II of their brief on page 34, *et seq.;* in their Reply Brief, subdivision I, folios 67, *et seq.*, pp. 36, 37; in the decision of the State Supreme Court on the first appeal, last part of folio 104, et seq., and folio 110; in the petition of plaintiffs in error for a re-hearing upon that first appeal, folios 78 to 89, inclusive, pp. 42 to 49; in folios 90 to 100 inclusive; in brief of plaintiffs in error. on second appeal, folios 141 to 154 inclusive; in their Reply Brief on said second appeal, folios 155 to 180 inclusive; and in the decision of the State Supreme Court, on the second appeal, folios 181 to 185, inclusive).

This record does not present any real federal question. The matters of which plaintiffs in error complain are only decisions of the State courts upon general questions of law, and of pleadings and practice, in those courts.

The mere averment by plaintiffs in error of a federal question does not necessarily present an actual federal question for the consideration of the court.

Millinger vs. Hartupee, 6 Wall. 258.
City of New Orleans vs. New Orleans Waterworks Co., 142 U. S. 79, 87.
Hamblin vs. Western Land Co., 147 U. S. 531.

This court said, in the above case of New Orleans vs. Waterworks Co.. "The bare averment of a federal question "is not in all cases sufficient. It must not be wholly without "foundation. There must be at least color of ground for such "averment, otherwise a federal question might be set up in "almost any case, and the jurisdiction of this court invoked "simply for the purpose of delay."

Again, the judgment of the State Court, in this case does not purport to determine any federal question, nor was the determination of any federal question necessarily involved therein.

The rule is well settled that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary for the determination of the cause and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

LeSausure v. Gaillard, 127 U. S. 216.
Johnson v. Risk, 137 U. S. 300.
Cook County v. Calumet & C. Canal & Dock Co., 138 U. S. 635.
Haley v. Breeze, 144 U. S. 130.

Now, we here call attention to the decision of the State court, sought to be brought up for review by means of this writ of error. (Folios 181 to 184). Briefly stated that decision is: 1st; That the identical question presented by the proposed supplemental answer of plaintiffs in error was presented, argued and determined in the first appeal to that court and became *res adjudicata;* the law of the case. 2nd; that upon the said first appeal the cause was remanded to the trial court with specific directions to award judgment of foreclosure of the said equitable mortgage; that therefore the trial court had no alternative but to comply with the mandate, and could not allow the interposition of the so-called supplementary answer, and proceed to a second trial; and 3rd; that, considering again the contentions of plaintiffs in error upon the point under dispute, their proposed supplemental answer did not set forth any defence, that the doctrine of election as between inconsistent remedies has no application to the facts of this case, and that defendant in error did not waive his rights under the equitable mortgage by contending that the liens of the original mortgages were not extinguished by merger in the equitable mortgage. (Folios 181 to 183 inclusive). Now, in all this there is not a suggestion of any federal question. The judgment was not based upon any federal

question, nor was the decision of any federal question necessary to the determination of the cause.

Again, even the averment of an alleged federal question, made for the first time after the cause was determined on its merits, the only question remaining in the case finally determined and become *res adjudicata*, and the cause remanded to the trial court, with specific directions for entry of final judgment, came entirely too late.

At that stage of the proceedings the State court had no power to award another trial of the question under dispute; there was no dispnte at all upon the facts of the case; and none was sought to be raised; nor was a new trial asked for as a ground for interposing a supplemental answer of any kind; the court had no power to grant the application for leave to interpose the proposed supplemental answer, nor to admit evidence under the same, even if it had set forth any defense, or any issue not already determined and become *res adjudicata*. It was then too late to present or aver a federal question, for the state court had then no power to do anything except to render judgment as directed by the highest appellate court of the State having jurisdiction.

Bushnell v. Crooke Mining, &c., Co., 148 U. S. 682.
Loeber v. Schroeder, 149 U. S. 580.
Texas & P. Ry. Co. v. So. Pac. Ry. Co., 137 U. S. 48.
Sayward v. Denny, 158 U. S. 180.

II

If the court should hold that it had jurisdiction or color of jurisdiction of the writ of error in this cause defendants in error are entitled to an affirmance of the judgment of the court below under Rule 6 of this court. Defendant in error unner Section 5 of Rule 6 has united with the motion to dismiss, a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest

the writ of error was taken for delay only; and also that the question on which the Jurisdiction depends is so frivolous as not to need further argument.

1st. We think this record shows clearly that the plaintiffs in error have taken this writ of error for the mere purpose of delay. All the questions under dispute by the parties, and especially the question so tenaciously disputed by these plaintiffs in error, as to whether defendant in error was precluded by estoppel or otherwise from claiming a foreclosure of the equitable mortgage, were fully and fairly considered and determined in the trial court and in the State Supreme Court upon the first appeal, no federal question being then in any manner before the court.

The State Supreme Court having rendered its decision specifically directing the trial court to render judgment for foreclosure of the equitable mortgage, plaintiffs in error first exhibit their desire to delay in their petition for a rehearing (folios 87, 88), where they use this language, addressed to the Supreme Court of the State, to-wit: "I think it proper for me to state, in presenting this motion, that I greatly prefer not to present or press this matter. But since the portion of the order here objected to will in all probability prevent any just settlement of the matter between the parties, unless at very great sacrifice, and since I feel confident that if that be stricken out and the matter left for future consideration, such settlement will be readily made, whereby each party will receive his moral dues and there will remain no occasion for any further consideration by the court, I have decided to present the matter."

Now what other consideration or expectation could have been in the minds of plaintiffs in error when penning this language in a petition addressed to the State Court praying that there be stricken out of its decision the determination that defendant was entitled to judgment of foreclosure of the equitable mortgage in this action and the specific direction to the trial court to that end, except that he might thereby prolong the litigation to the discouragement of the defendant in error and thereby secure an advantageous settlement of the case.

Failing in that and the case having been remanded for the amendment of the findings of the trial court and the entry of final judgment, plaintiffs in error next make application to the trial court for leave to file a supplemental answer which clearly presents no defense whatever and seeks only to relitigate the same questions which had already been determined upon full hearing: questions which had become *res adjudicata* as between the parties in this very suit. We think it clear that there could have been no purpose in making that application except the purpose to prolong the litigation and delay the result.

Evidently expecting to fail in that application, plaintiffs in error make an averment in that supplemental answer that, if it be not granted, any judgment rendered against them would be treated as depriving them of property without due process of law and denying them equal rights as citizens under the laws:—evidently looking forward to a writ of error to the Supreme Court of the United States as a means of further delay and prolonging of the litigation.

Let it be remembered that this was an action to foreclose a lien for a considerable amount upon a large tract of land constituting an improved farm in the possession of the plaintiffs in error; and it would seem certain that, so long as the litigation looking to such foreclosure could be prolonged, plaintiffs in error would continue to reap the advantage of such possession and secure to themselves the rents and profits of the land. A case was therefore settled upon their application, making up a record not merely for the Supreme Court of the State, but presenting, as plaintiffs in error evidently considered, a record which would carry a federal question, under a writ of error, to the Supreme Court of the United States; and thus further prolong and delay the controversy. Being defeated in the State Supreme Court, and judgment having been entered in that court affirming the judgment of the trial court, which judgment of affirmance bears date December 15, 1899, plaintiffs in error deliberately wait until near the expiration of the two years allowed in which to take out a writ of

error to bring that judgment up for review, and then sue out the present writ of error.

From all this which appears in the record we think it manifest that this writ of error was taken for the purpose of delay only.

2nd. We further contend that in the present cause the question on which the jurisdiction of this court depends, (if such jurisdiction exists), is so frivolous as not to need further argument, and that such question was rightly decided in the State Court, and that therefore it is unnecessary to keep the case in this court for further argument.

Spies v. Illinois, 123 U. S. 131.
Church v. Kelsey, 121 U. S. 282.
Arrowsmith v. Harmoning, 118 U. S. 194.

III.

Considering the decision of the State Supreme Court upon the merits, we confidently argue that its propositions of law are sound and in accordance with the well settled principles of jurisprudence.

The alleged errors assigned by plaintiffs in error may, we think, be condensed into the following:

(a). That it was error in the State Supreme Court, on the first appeal, to render judgment remanding the cause to the trial court with the specific directions given which disposed finally of the cause and in effect directed the entry of judgment of foreclosure of the equitable mortgage.

(b). That it was error for the trial court to obey those specific directions, deny their motion for the allowance of their supplemental answer, reject their offers of evidence thereunder, and proceed to determine the amount due upon the equitable mortgage and enter judgment for its foreclosure, as directed by the mandate of the appellate court.

(c). That it was error in the State Supreme Court, on the second appeal, to stand by its decision made on the first appeal, holding it to be right, and to have become "the law of

the case," making the whole matter *res adjudicata*, binding upon the parties and the court in all subsequent proceedings.

(d). Based upon these three complaints, plaintiffs make the averment that the proceedings in the state court did not constitute "due process of law," that thereby plaintiffs in error were deprived of their property without due process of law and were denied the equal protection of the laws.

1.

As to the decision and judgment of the State Supreme Court, on the first appeal, which we have said was a judicial determination of the whole case upon the merits, deciding the first question involved, (the question of merger of the four original mortgages into the contract and transaction of February 19, 1895, as a new, equitable mortgage), in favor of plaintiffs in error, and determining the remaining question, (that of estoppel of defendant in error to claim under the said equitable mortgage by reason of his contention against such merger), in favor of defendant in error; we call attention to the fact that said decision, judgment and remand with specific directions disposing of the whole case, was rendered on August 15th, 1898, more than three years prior to the suing out of the writ of error herein (Transcript of Record, folios 102 to 110); yet no appeal therefrom, nor writ of error for review thereof, has ever been taken, and it is not before this court for review. The writ of error herein and the petition therefor relate only to the judgment of the State Supreme Court rendered, on the second appeal to that court, on the 15th day of December, 1899. (Transcript of Record, folio 194, on page 107).

2.

The said judgment, decision and remand with such specific directions determining the whole case on the merits, rendered on August 15, 1898, was a direct adjudication upon the very question as to which plaintiffs in error have made their complaint throughout the entire litigation; the said question of estoppel of defendant in error to claim a lien under

the said equitable mortgage and a foreclosure of the same, after having contended against the alleged merger of the original mortgages. All the facts upon which such contention was made for such estoppel were of record and were undisputed, and the question itself was raised and urged by plaintiffs in error upon that record, on the first appeal. We here quote the exact words of that decision upon that question: "It is argued by defendants' counsel that in this action "plaintiff is not entitled to a foreclosure of this equitable "mortgage, the reason given being that he elected to institute "this proceeding for a foreclosure of the original mortgages "only, and expressly declined to accept the relief afforded by "a foreclosure of that found in the contract. As before "stated, the complaint is broad enough to have justified find-"ings upon which could have been predicated conclusions of "law in accordance with the views hereing expressed, and "ordering a foreclosure of the equitable mortgage for the sum "due on the contract, with proper costs of the proceeding; "and the findings of fact actually warrant such conclusions, "except that the sum due was not ascertained. No good "reason existed at the termination of the trial below, and "none now exists, why plaintiff should not be entitled to a "foreclosure in this action of this equitable mortgage on the "790 acres. The judgment appealed from is reversed and "set aside * * * . Upon the remanding of the "cause to the court below, it will proceed to determine the "amount due upon the equitable mortgage, amend its find-"ings of fact to correspond, and also amend its conclusions of "law in accordance with the views herein expressed." (Transcript of Record, folio 110; 73 Minn. 332; 76 N. W. 57.)

How can it be contended that this judgment and decision of the highest court of the State did not fully and finally determine that question?

Plaintiffs in error moved that appellate court for a rehearing upon that question alone, and in their petition for a rehearing elaborately and fully argued again their conten-

tions upon it, presenting numerous authorities which they deemed to support their arguments, which motion was denied. (Transcript of Record, folios 78 to 89, inclusive.)

How can it be claimed that plaintiffs in error did not have their day in court, and did not have a full hearing, upon this question of their own raising?

That decision became the "law of the case," upon that question, to be followed in all subsequent proceedings therein, and thereby this question became *res adjudicata*, as was rightly held by said State Supreme Court, on the second appeal. (Transcript of Record, folio 183. 78 Minn. 221; 80 N. W. 970.)

2 Enc. of Pl. & Pr. p. 375 et seq. and cases there cited.
Johnson v. Telephone Exchange Co., 54 Minn. 37.
Tilleny v. Wolverton, 54 Minn. 75.
Phelps v. Sargeant, 73 Minn. 260.
Union Nat. Bank v. Rich, 116 Mich. 414; 74 N. W. 659.
2 Enc. of Pl. & Pr. p. 378, and notes 1 and 2 and citations.
Ib. 379, and note 3 and citations.

As was rightly held by the State Supreme Court, on the second appeal (folio 183) the cause having been remanded to the trial court on the former appeal "with directions to award "judgment of foreclosure as to the equitable mortgage, that "court had no alternative but to comply with that mandate." "Where judgment is reversed with specific directions, the "court below has no discretion in the premises, but must "pursue the mandate of the appellate court." 13 Enc. Pl. & Pr., 864.

3.

Even if it had been in the power of the trial court to have granted an application for leave to file a supplemental answer,

after the cause was remanded for further proceedings, it would have been right for that court, in the exercise of its discretion, to have denied the application of plaintiffs in error for leave to file the proposed supplemental answer. (Folios 96, 97.) The Statutes of Minnesota, respecting the allowance of supplemental pleadings, (Gen. St., 1894, Sec. 5270), provide as follows: "The plaintiff and defendant, respectively, "may be allowed, on motion, to make a supplemental "complaint, answer, or reply, alleging facts material to the "case, occurring after the former complaint; answer, or reply."

Now, referring to the proposed Supplemental Answer set out in this record (folios 96 to 98) we observe that only subdivision I. thereof pretends to set forth any fact or circumstance of any kind occurring after the former answer; and said subdivision I. sets forth only the said facts of the offer by plaintiffs in error at the opening of the trial to permit defendant in error to take judgment foreclosing said equitable mortgage; the refusal of defendant in error to accept that offer, and the withdrawal afterward of that offer by plaintiffs in error. These were the very same matters which plaintiffs in error had caused to be made matters of record; they having occurred in open court as part of the trial proceedings (folio 17, p. 10), and which they had urged, both in the trial court and on appeal in the State Supreme Court, as ground of estoppel and defense against the claim of defendant in error for a foreclosure of the contract as an equitable mortgage, in case it should be held (as it finally was) that the original mortgages were extinguished by merger. We submit that, passing for the present the point already dwelt upon by us that these matters had become *res adjudicata*, it was right and proper for the trial court, in the exercise of its discretion, to deny the application made at that late day, after an unsuccessful trial of the same matters upon a record made in a settled "case" and carried to the State Supreme Court by the plaintiffs in error. We think it would have been an abuse of

discretion for the trial court to have granted such application, even if it could have exercised any discretion in the matter, But certainly a denial of such application in the exercise of a sound discretion, under the circumstances, should not be reviewed and disapproved by any appellate court.

Suidam v. Truesdale, 6 McLean (U. S.), 459.
State v. Williams, 90 Iowa, 513; 58 N. W. 904.
Schouweller v. Hough (S. Dak.), 63 N. W. 767, 777.
Voak v. Investment Co., 51 Minn. 450.
Investment Co. v. Nat. S. L. 7 B Ass'n, 51 Minn. 198.

Moreover, we here submit, (what was rightly decided by the State Supreme Court, on the second appeal in this case, (at folio 183), that this proposed supplemental answer was rightly disallowed by the trial court for the reason, (if there were none other), that it states no defense whatever. The doctrine of election of remedies has no application to the facts of this case. In the said contention between plaintiffs in error and defendant in error, as to whether the original mortgages were or were not merged in the contract of February 19, 1895, and thereby extinguished, the question was by no means one of election between two co-existing, inconsistent remedies, or rights, but only one of determining the particular relief to which defendant in error was entitled, in the pursuit of the one, sole, remedy of foreclosure, upon consideration of all the facts, which are fully set forth in the complaint. There never have existed two rights, or two remedies, as to which defendant in error ever had or claimed an election, or could be required to elect. He had but one remedy.—that of foreclosure of his lien upon the land. The character and amount of that lien depended upon the construction to be put upon the contract of February 19th, 1895. Did it, or did it not, supersede and extinguish by merger the original mortgages. It was impossible that both of these

alternatives should exist to afford the right to elect as between them. The doctrine of election of remedies has no application.

7 Enc. Pl. and Pr., Title Election of Remedies, p. 361, *et seq.*
In Re Van Nornum, 41 Minn., 494.
Marshall v. Gilman, 52 Minn., 88.

It cannot be contended that any other portion of the said proposed supplemental answer states any defense. Subdivision II refers to matters occurring long before the commencement of this action, the same matters, enlarged upon, which were pleaded in abatement in the answer of plaintiffs in error herein, (folios 15, 16), and which were abandoned at the trial, or at least not insisted upon. (Folios 18 to 20.)

The balance of said proposed supplemental answer contains only certain bald propositions of law, but no facts whatever.

There is no error of any kind in this record.

IV.

We do not think it either necessary or wise to discuss here the question of "due process of law," upon which there has been endless controversy and discourse in the books, with all of which this court is familiar. We will only say that it cannot be questioned upon this record that plaintiffs in error have been granted a fair hearing and trial of every question in this cause, and have had ample notice and opportunity for the making of every possible defense, and have availed themselves thereof, and have urged their every objection and contention with remarkable persistency upon the consideration of the courts, have been granted careful and patient hearing and consideration upon every point; so that there is not the slightest ground for their assertions that they

are deprived of property without due process of law, or have been denied the equal protection of the laws.

They certainly cannot with any show of justice make the bold demand that the courts should simply wipe out their indebtedness to defendant in error of more than $23,000, and the lien upon their lands securing the same, for reasons so trivial and so utterly untenable as those urged by them and disclosed in this record.

Respectfully submitted,

FRANK B. KELLOGG, ROBERT TAYLOR,
WESLEY A. SPERRY AND LEWIS L. WHEELOCK,
Counsel for the Defendant in Error.

Supreme Court of the United States

1

No. 225.—October Term, 1902.

JOSEPH A. SAWYER and NELLIE A. SAWYER,
Plaintiffs in Error,

vs.

DANIEL S. PIPER, Defendant in Error.

2

ARGUMENT OF DEFENDANT IN ERROR.

If frequent and persistent repetitions of bald assertions, unaccompanied by argument or demonstration, but reinforced with loud asseverations of fancied oppressions, persecutions and bad faith, said to be chargable to the defendant in error and provable by alleged things existing outside the record, could be made convincing to the court, we have no doubt that the 3
briefs and printed argument of plaintiffs in error, in the present case, might lead to the belief that this defendant in error is guilty of extortion, or attempted extortion, wicked oppression and double dealing, of the worst form, throughout his entire course of dealing with plaintiffs in error; and that in this action he, the plaintiff in the court below, has been guilty at once (1) of improperly uniting several distinct and inconsistent causes of action, (2) of seeking to force the defend-

4 ants "either to abandon all defences and submit to spoliation, or try two actions (on a single demand) throughout the trial and supreme courts of the state, and one of them by writ of error to this court. Multiplicity of suits in its most odious form, coupled with intended oppression and spoliation," (3) splitting his causes of action and trying them by piecemeal, (4) deliberately electing to pursue one of two inconsistent and antagonistic remedies, in an effort to recover thousands of dollars in excess of his just claims, (5), after having pursued such inconsistent remedy (so deliberately chosen) to final 5 judgment and defeat, and, till then, persistently repudiated the other remedy and unqualifiedly rejected an offer by defendants, on the trial, of judgment for full relief thereunder, entirely shifting his position and taking up the abandoned and repudiated antagonistic remedy, as to which (they say) no trial had been had, or could have been had, and no defense had been made or offered or could have been offered by defendants, and (6) arbitrarily preventing, through erroneous rulings of the courts, the defendants from offering or attempting any defence against such new attack, or being heard upon the 6 same, although they showed themselves to have such defense and made due application for a trial and hearing thereon. (See the printed argument of plaintiffs in error, pp. 6, 7 and 8; brief in chief of plaintiffs in error, pp. 22 et seq.; 37, 38 and 39, etc., etc., and throughout their briefs and printed arguments, where these complaints are shown to be the gist of their contentions.)

Now, let us examine some of these complaints, in the light of the record, which is before this court.

(1.) If it were true that, in the complaint in this action several causes of action are improperly united, (which we do

not admit), it is clear that such defect was waived by de- 7
fendants. The statutes of the state of Minnesota relating to pleadings and practice contain the following provisions: "The "defendant may demur to the complaint within twenty days "after the service thereof, when it appears upon the face "thereof, either: First, that the court has no jurisdiction of "the person of the defendant or the subject of the action; "second, that the plaintiff has not legal capacity to sue; "third, that there is another action pending between the "same parties for the same cause; fourth, that there is a defect "of parties, plaintiff or defendant; fifth, *that several causes of* 8
"action are improperly united, sixth, that the complaint does "not state facts sufficient to constitute a cause of action." (Gen. St. (Minn.) 1866, Chap. 66, sec. 74, as amended in Laws of 1867, c. 62, sec 5; Statutes of Minnesota, 1894, Vol. 2, sec. 5232.)

"When any of the matters enumerated in section seventy-four "do not appear upon the face of the complaint, the objection "may be taken by answer." (G. S. 1866, c. 66, sec. 77: Statutes of Minnesota, 1894, Vol. 2, sec. 5234.)

"If no such objection is taken, either by demurrer or 9
"answer, the defendant is deemed to have waived the same, "excepting only the objection to the jurisdiction of the court, "and the objection that the complaint does not state "facts sufficient to constitute a cause of action." (G. S. 1866, c. 66, sec. 78; Statute of Minn., 1894, Vol. 2, sec. 5235.)

This record shows that no objection was taken to the complaint herein, of the nature complained of now for the first time, by plaintiffs in error, either by demurrer, or by answer. Therefore, if such defect existed at all, it was waived. Defendants, without objection went to trial of any

and all the issues and causes of action presented by the complaint.

(Tr. of Rec., folios 14, 15, 16, 17, 18, 19, 20.)

The only objection made to the complaint in any stage of the proceedings was made in the briefs and argument of plaintiffs in error upon the first appeal to the state supreme court, (confusingly interwoven with the two other claims there urged, that defendant in error had elected to bring action only for foreclosure of the original mortgages and declined to accept the offer of plaintiffs in error of judgment foreclosing the "equitable mortgage" alone, and that the plea of defendant in error for at least a foreclosure of the contract of February 19, 1895, for the amount the court finds due thereon, in case it determines that the original mortgages were extinguished thereby by merger therein, was a "shifting of plaintiff's position" which could not be allowed on the appeal); that the plaintiffs said complaint was not sufficient in its allegations and prayer for relief to entitle him to a judgment foreclosing that "equitable mortgage." (Tr. of Rec., Subdiv. VIII, at beginning of fol. 54; Subdiv. II in folios 62, 63; and Subdiv. I, in their Reply Brief, in folios 67, 68). But in this objection that court overruled them, and decided rightly against them, using the following language, respecting the complaint, at the last of folio 106 and first of folio 107, to wit: "The complaint in "this action set up the execution, delivery and record of each "of the mortgages, the assignment of the three, which in "point of time preceded that in which plaintiff was mortgagee, "and the recording of each assignment, the making of the "contract before referred to and the default of the defend-"ants in its terms and conditions. Judgment was "demanded to the effect that by reason of the default

"on defendant's part the original sums due upon the 13
"notes secured by the four mortgages be adjudged
"due, and a foreclosure of each mortgage be had for
"the respective sums due, with a sale of the mortgaged prop-
"erty to satisfy the debts. Or that the contract itself be
"foreclosed by sale of the premises therein described to satis-
"fy the amount due thereon with attorney's fees, costs and ex-
"penses. Further and other equitable relief was also demand-
"ed." And again, when treating of this very point as to plaintiffs being entitled to a judgment foreclosing this contract as an equitable mortgage, that court says in folio 116: 14
"As before stated the complaint was broad enough to have
"justified findings upon which could have been predicated
"conclusions of law in accordance with the views herein
"expressed and ordering a foreclosure of the equitable mort-
"gage for the sum due on the contract, with proper costs of
"the proceedings, and findings of fact actually made warrant
"such conclusions, except that the sum due was not ascer-
"tained." Thus was this objection to the sufficiency of the complaint to warrant a foreclosure of the "equitable mortgage" adjudicated against plaintiffs in error, and, as we understand them, has never been, and is not now urged further 15
by them. The point also made by plaintiffs in error on that appeal, interwoven with that objection to the complaint as above stated, (and so interwoven also with the chief point of said plaintiffs in error above referred to,—that of alleged "election by defendant in error of an inconsistent remedy," amounting to an estoppel against him, to which we will hereafter make further reference), viz., their said point that to allow plaintiff to recover judgment of foreclosure of that "equitable mortgage" would be to permit him to shift his

16 position from that occupied by him in the court below, and make a total change of base, was also fully urged upon that first appeal, and was also necessarily decided against them in and by that judgment of that supreme court, and became "res adjudicata." We do not understand that plaintiffs in error have since urged, or do now urge that point as to "shifting of position". But they do still interweave it with their other complaints as evidencing bad faith, oppressive conduct, etc.

But we submit that the complaint herein does not in
17 fact set forth any more than one cause of action. Plaintiff had a certain aggregate amount due him from defendants, which originated, at least, in the four original mortgages and the notes secured thereby, and which were not formally released, and were still held by plaintiff, together with the deed of defendants to him of February 19, 1895, and the contract of that date, and were all alike affected in some material way by that contract and deed and the escrow deed held by the depositary, Mr. Woodman, either merging them all in the later transaction, as a substituted
18 equitable mortgage, in which case they were still the basis of such equitable mortgage and proper matter to be set forth therewith in the complaint, or so modifying and affecting them all, by relieving them of all defaults already having occurred in any of the terms and conditions of them or any of them, and providing that no default therein should occur, thereafter, save by the occurrence of a default in the payment of the monthly accruing sum of $100, provided by that contract, so that no cause of action upon any of them could arise except by occurrence and proof of such default in payment of that sum of $100 each month, and giving to the

plaintiffs the option to pay at any time or times, in sums of 19
not less than $50, as they themselves might determine, the aggregate amount of $20,400, in addition to such monthly payments of $100 continuously (diminished from time to time after any payments toward such $20,400, in the proportion that such latter payments should bear to the entire $20,400), and become thereby entitled, upon such full payment of such $20,400, as a principal sum, in addition to such continuous monthly payments, to a delivery of said escrow deed of warranty, which would, of course, then convey the title in fee absolute back to defendants free of all incumbrances, and 20
would extinguish alike all such mortgages, said contract included.

In either case there was but one cause of action, of which said contract and the default in its terms was an essential ingredient, and but one remedy, to wit: the foreclosure of the lien held by plaintiff securing the debt, whatever that might be determined to be. If there was such extinguishment by merger of the original debts and mortgages, it seems clear that, under the contract there remained no personal liability against defendants, or either of them, for any thing 21
more than the monthly payments, for which any personal judgment could be obtained; and it seemed at least very doubtful whether there was any such lien created as security for the enforcement of payment of the said $20,400, as could be enforced by foreclosure, since it not only never was to become due, by the terms of the contract, but its payment at all seems to have been made optional with defendants.

For ourselves we have never had any doubt that it was not the intention of the parties to that contract,—and especially not the understanding, or the intention of the plaintiff,

22 who never had any conception of such a thing as "extinguishment by merger,"—that it should thus extinguish those original debts and mortgages. Whether the said contract did effect such extinguishment or not, was and is a pure question of law, to be determined by the construction which should be given to that contract,—a matter to be determined only by the "infallible" final judgment of the court of last resort if either party should carry its decision to such court; which, in this case, was the supreme court of the State of Minnesota. Such final judgment is necessarily "infallible",
23 in the sense that it is conclusive and ends the questioning.

In bringing and prosecuting this action plaintiff did plead all the facts, setting up the whole of the mortgages and notes, their assignment to plaintiff, the contract and deeds of February 19, 1895, all the facts attending them, the payments made, the defaults, demands, and failures of defendants, plaintiff's performance on his part, etc.; and asked for judgment foreclosing each and all of said mortgages and said contract for the amount which should be found to be due to plaintiff.

24 It is shown clearly by the record of the trial (folios 14 to 20 inclusive, et seq.) that it was this question of extinguishment of the original securities by merger that constituted the only difference and matter of contention between the parties at that time. The offer of defendants, at the beginning of the trial, to permit judgment to be taken by plaintiff of "foreclosure in the case based upon and for the amount provided "in the contract or agreement," is ample proof that he understood all this, and recognized that plaintiff must be conceded the right to relief to that extent, at least; and that they would be glad to end the controversy on that basis,

without an adjudication by the court upon that disputed question of law. 25

For plaintiff to accept that offer would be to abandon his own views as to what should be the proper decision of the question, and concede all that defendants contended for. He was under no obligation to do that. He had a right to the determination of the court upon that question, and there was clearly no case for a requirement that he elect either to repudiate the contract, or to abandon and repudiate all claim under the original securities.

It will be seen by a simple computation that, according to the original securities, if they were not extinguished, plaintiff would be entitled to at least $2000 more than the whole amounts even mentioned in the contract,—a sum worth seeking a judicial decision of the "merger" question for, and a sum to which he was clearly entitled, morally, at least. 26

Besides, it will be noticed that there was an indefiniteness and uncertainty about the offer of judgment thus made. It was not an offer of judgment of foreclosure of the "equitable mortgage" for the sum of $20,400 of principal and $100 for each month since default was made in such monthly payments, nor for any definite sum. It would still leave to be contested the question, "How much is provided in the contract, for which such foreclosure is conceded and acepted?" Plaintiff appears by the record to have had some experience, prior to that time, along that line. In the previous action between the parties, concerning which defendants make great complaint, and which was pleaded in their original answer herein as an action for the same cause between the same parties, pending in the same court, and therefore pleaded in abatement, (folios 15, 16), to which plea plaintiff replied, showing that such action 27

had been by judgment of the court dismissed without prejudice to plaintiff, (folios 16, 17), being the same action the records and proceedings in which defendants again sought to set up in their proposed supplemental answer, as alleged "supplementary" matters in defense, after the remand of this cause to the trial court, upon determination of the first appeal (folios 96, 97, Subdiv. II, of such Supplemental answer), which record was offered in evidence by defendants (folio 111), and thus came into this record, as evidence offered and rejected by the court, under exception by defendant, and appears in the record at folios 115 to 133, inclusive, a decision by the court was at one stage of that cause obtained, setting out findings, and direction for foreclosure of that same contract, (after default in its terms for the monthly payments of of $100), for the amount provided therein, which amount was then adjudged to be only the sum of the accrued and unpaid monthly payments, with interest aggregating only $1,135.83, (folios 123 and 124). After which that action was dismissed by judgment, without prejudice to plaintiff, (folios 132, 133). Now, it seemed not unlikely that an acceptance of the offer of defendants at the trial of this cause, to "allow the plaintiff to "take a decree of foreclosure in this case based upon and for "the amount provided in the contract—or agreement," (folio 17), might prove equally disappointing, in view of the opportunities appearing to be afforded for further contention as to the amount that could ever become due under the provisions of that contract which appeared to merely give defendants an option to pay the $20,400 of principal "at such time or times as may be determined by" defendants themselves.

We think it clear that plaintiff had a right to insist upon a judicial decision of the disputed question of law as to the

extinguishment of the original securities, and of the nature 31
and effect of the contract, and the rights of the parties thereunder, in the light of all the facts of the case.

(2.) This course of action was in no sense arbitrary, oppressive, extortionate, or oppressive, and was no evidence whatever of bad faith in the plaintiff. We think these vigorous charges of extortion, oppression, spoliation, and bad faith, made in the briefs and argument of plaintiffs in error, come with ill grace from them, in view of the manifest fact that this very contract was evidently a generous concession to them by plaintiff, conditionally (at least) giving them a de- 32
duction from their just debts to him of more than $2,000, and all the time they should elect to take, for the payment of the reduced principal, conditioned only upon their prompt payment of the interest, (also at a reduced rate), at the end of every month, continuously, &c.; and especially, in view of the patent and brazen effort of defendants themselves, in and by these unconscionable proceedings, not only to get rid of all personal liability to plaintiff on account of an indebtedness of more than $25,000, but also to get back their 790 acres of land, entirely freed from all liens securing such just indebted- 33
ness. For, stripped of its concealments and groundless complainings, the course of action of plaintiffs in error in this cause, certainly stands forth in just that uncommendable attitude. It is clearly toward that end that they have been struggling, in all this prolonged litigation.

(3) We come, now, to the matter of defendants' complaint that they were wronged by the judgment of the State Supreme Court, upon the first appeal, in adjudging that plaintiff was entitled upon the record of the pleadings and trial, to a judgment foreclosing the "equitable mortgage,"

and remanding the cause to the trial court with specific instructions to amend its findings by ascertaining and finding the amount due thereon, (a mere matter of computation, since all the facts bearing upon that question, as to the terms and provisions thereof, the amounts paid thereon, defendants' default, were matters of admission at the trial). (Folio 18.) Defendants claim that upon that appeal they did not present, or submit, to that court, and had not presented and urged before the trial court, as a defense against plaintiff's claim for a recovery of such judgment for foreclosure of said "equitable mortgage," in case it should be held that the original securities were extinguished thereby and merged therein, the alleged "election" by plaintiff to stand upon and pursue solely the right to a foreclosure of the original mortgages, and to repudiate wholly and unconditionally the contract, or equitable mortgage, because he declined said offer of defendants at the trial to allow plaintiff to take a decree of such foreclosure. They admit in their briefs and argument here, that they did present and urge such "election" and pursuit of the foreclosure of the original mortgages, only, and such rejection of their said offer to allow such decree of foreclosure of the "equitable mortgage," both before the trial court, in their motion for an amendment of its findings (folio 37, subdiv. III), and before the State Supreme Court on that appeal, (folio 54, subdiv. VIII, folio 62, subdiv. II, folios 80, 81, on page 44), for the purpose of defeating plaintiff from obtaining such foreclosure of the equitable mortgage in this action and to secure a dismissal of this action; but attempt to make the distinction that such presentations of such alleged "election" were then only made as a defense against such recovery in this action, and not as an absolute defense by way of estop-

pel against such recovery in any action whatever, or at all, 37
because such absolute defense by way of estoppel did not become complete till after the judgment of the supreme court on that first appeal, in which it held that such original mortgages were extinguished by the merger; while their application after the remand for leave to file the proposed supplementary complaint setting up the same matter of alleged election to pursue the alleged inconsistent remedy, was an offer of a perfected and absolute defense, by way of perpetual estoppel, against such recovery by plaintiff of judgment of foreclosure 38
of such equitable mortgage in this, or any other action; it being claimed by them that such perfected defense by way of absolute estoppel did not arise till the rendition of judgment in the appellate court, declaring the extinguishment of the original mortgages by merger in the equitable mortgage; plaintiff having had till, and during all the time from the trial in the lower court till such judgment of the supreme court a "locus penitentiæ" in which he could change his tactics by seeking the true remedy and ceasing to rely upon the wrong and impossible, inconsistent one. (See Brief in Chief of 39
plaintiffs in error, pages 16, 17, 18 and 19). If there be anything in this "locus penitentiæ" theory, and the distinction that in such a case as this, no election of remedy is complete till the final judgment of the appellate court be rendered, then we submit that, in the present case, the record not only does not show, but could not show, in the nature of the case, any such complete "election" in the trial court, and that it does show that in the appellate court, if plaintiff had ever been traveling the road leading toward such an "election," he left it in that court, and was there claiming his right to a judg-

ment of foreclosure of the equitable mortgage, if it be held that it has swallowed up the original mortgages by merger; for we find the plaintiffs in error themselves so complaining in their briefs, and vigorously objecting to such claim being allowed, charging that it is an unwarranted "shifting of his position," "changing of base," etc. If, therefore, there be anything in this fine-spun distinction, it is clear from the record relied upon by plaintiffs in error themselves, and made by them, that defendant in error did not make such a perfected "election" at all. Besides, in that case, the proposed supplemental answer of the defendants, setting up the "election" relied upon, (folio 96, subdiv. I) stops far short of averring such perfected election by plaintiff as to constitute such defense as they claim to have tried to get a hearing upon and were deprived of such hearing, for there they allege only the said offer at the trial to allow plaintiff to take judgment and decree foreclosing the lien of his equitable mortgage and for the amount due and unpaid on such equitable mortgage; that said offer was then, and in open court, declined by plaintiff, and such relief refused by him. No other election or act of that nature is alleged therein. And to show further that no such perfected election could have been persistently pursued by a continuous rejection of such offer of defendants, till plaintiff had had his "locus penitentiæ extending from the "trial until the judgment of the supreme court," they add the allegation "that thereafter, and before said cause was "submitted to this court" (the trial court) "for decision, said "defendants withdrew said offer." How could plaintiff continue to reject the offer, after it was withdrawn?

Plaintiffs in error evidently saw the want of logic in this "distinction" when set up beside these allegations of the pro-

posed supplemental answer, for they next hedge by asserting 43
that it is a settled rule of the courts of Minnesota, that when application is made by a pleader to file a supplemental answer, unless he be barred, such filing thereof is matter of right and the court has no discretion to refuse it, and its sufficiency is thereafter to be determined in the usual manner. (Brief of plaintiffs in error, p. 23.) Now, we submit that no such sweeping rule exists in Minnesota, as is shown in the very case cited by them on that point, (Malmsten vs. Berryhill, 63 Minn. 1): for in that very case the court sustains the action of the trial court in its refusal to allow the prof- 44
fered supplemental answer. We consider it simply absurd to hold that, when a supplemental answer is offered which does not state any defense at all, the court must allow it and then have its offensive presence removed by demurrer, motion to strike out, or some other method. Plaintiffs in error erroneously assert that this supplemental answer was objected to and disallowed on the sole ground that under the mandate of the supreme court the trial court had no power to allow it. While the objection was made and rightly made on that ground, it was also made on the ground distinctly specified 45
"that the proposed supplementary answer did not set up "facts constituting a defense." (Folio 112).

We think, at any rate, that the attempted distinction between urging an alleged matter of defense against a recovery sought in the action, and urged only as a defense against such recovery being had "in this action," and the urging of precisely the same matter as a defence in the same action at another time against the same recovery therein, claiming it to be an absolute defense by estoppol in that action or any other action, is a "distinction without a difference," and is

46 entirely too fine to enable one thereby, after full hearing and determination by judgment of a live Court, upon such defense as thus first offered and urged, to obtain a second trial and determination of that same matter of defense in the same action, against the same recovery, although so urged as such absolute defense by estoppel; in that action, or any other.

In the matter here under consideration, precisely the same matter respecting the alleged election of remedies, unchanged and unmodified by any additional allegation of fact or circumstance, as was sought to be set forth in this disal-
47 lowed supplemental answer, was previously presented by these same plaintiffs in error and urged with a full and careful hearing by the appellate court, on the appeal there tried, and was by that court fully and fairly heard and was duly determined by that court, against their contention, and thus became res adjudicata, and they thereby had their "day in court," and such proceedings constituted "due process of law." Plaintiffs in error were fully granted and accorded the equal protection of the laws.

We submit that the case of Warner vs. Godfrey, 186 U.
48 S. 365, cited and apparently relied upon by plaintiff, has not the slightest semblance in substance, or principle, to the present case. We will not take the time and space to state that case and its facts and the points decided, which would necessarily be quite lengthy to be complete and understandable. But we invite its examination by the court, unless it is so fresh in the minds of the Honorable Justices thereof, as to make such examination unnecessary, and a comparison of the same with the case at bar. Nor is the case of Hovey vs. Elliott, 167 U. S. 409, at all in point here.

We submit respectfully that, as is said by the state

supreme court of Minnesota in this case, (fol. 183), "The doc- 49
"trine of election of remedies has no application to the facts
"of this case."

There was only one cause of action and but one remedy sought, and pursued by plaintiff. The particular relief to which he was entitled depended upon the proper construction to be given to the contract of February 19, 1895, which construction must be determined by the proper court having jurisdiction, which in this case, was the Supreme Court of the state of Minnesota. It was purely a question of law for the court. No person or party could possibly have any right of election, to determine it; and no party can be 50
held estopped, nor to have waived any right by urging his own views, or those of counsel for him, upon the attention of, and for the aid possibly of, the court in its reaching a determination of the question.

It surely is not necessary to answer the complaints made by plaintiffs in error because they were not permitted to set forth by supplemental answer the facts and record of the former action between these parties, which had been disposed of by dismissal without prejudice, long before the commencement of this action, and which had been pleaded by plaintiffs in error, as matter in abatement, as a former action pending 51
between the same parties for the same cause, in their first answer, and its dismissal without prejudice alleged by defendant in error in his reply to such answer, and which plea in abatement was evidently abandoned on the trial, or at least was not there urged. (Folios 14 to 20, inclusive, and folio 97, subd. II, and folios 111 to 133, inclusive.) There is nothing in it in any way material, or pertinent to the present case, or stating any defense, nor any thing of a supplementary nature.

There is no error in this record. Plaintiffs in error have

52 been in no manner deprived of the equal protection of the laws, nor of any of the immunities or rights of citizens, nor deprived of life, liberty, or property without due process of law. They have had their "day in court," and have been granted a full, free and fair hearing on all the matters under consideration, at any stage of the proceedings, and they have nothing to complain of.

Respectfully submitted,

FRANK B. KELLOGG, ROBERT TAYLOR,
WESLEY A. SPERRY AND LEWIS L. WHEELOCK,
Counsel for Defendant in Error.

Supreme Court of the United States.

No. 225.—October Term, 1902.

Joseph A. Sawyer and Nellie A. Sawyer, Plaintiffs in Error, vs. Daniel S. Piper. } In error to the Supreme Court of the State of Minnesota.

[April 27, 1903.]

On April 27, 1897, Daniel S. Piper, the defendant in error, commenced a suit in the District Court of Steele County, Minnesota, against the plaintiffs in error and L. C. Woodman. The complaint alleged the ownership by the Sawyers of a tract containing 790 acres, upon which were several mortgages, all of them fully set forth and all belonging to the plaintiff. It also averred an agreement, made on February 19, 1895, by the terms of which the Sawyers were to pay plaintiff the sum of $20,400, with, in addition, monthly payments of $100; that the Sawyers were to convey the land to plaintiff; that he should execute a deed to them, the deed to be placed in escrow in the hands of Woodman, the other defendant, and to be delivered to them on full payment of the sums named; with a proviso that upon failure of the Sawyers to make payment of the $20,400, with the monthly additions of $100, all their rights under the contract should cease and determine. The complaint further alleged a failure to make the monthly payments. The prayer was for a judgment of strict foreclosure of the contract unless redeemed within a year by the payment of the amount due with interest, or, in the alternative, if the court should deem it inequitable to adjudge a strict foreclosure, that the contract and all the mortgages be foreclosed by the sale of the mortgaged premises, and for such other and further relief as should seem just and equitable. The defendant Woodman, who held the deed in escrow, made no defense. The Sawyers answered, admitting the allegations of the complaint in respect to the mortgages and contract, and alleged that by such contract the amount due the plaintiff was fixed at $20,400, which included interest upon all the mortgages up to February 19, 1895. They also averred that the plaintiff had commenced in the same court an action of ejectment, which was still pending, and therefore this action should be abated. In his reply the plaintiff admitted the commencement of the action of ejectment, but alleged that it had been dismissed prior to this suit. On the trial the Sawyers offered the plaintiff a decree of foreclosure for the $20,400, named in the contract, and all unpaid monthly payments, which offer

was declined. The court thereupon found the facts in respect to the mortgages and agreement as alleged in the complaint; ruled that such agreement did not extinguish by merger or otherwise the several mortgages, and that the plaintiff was entitled to foreclosure of each of the mortgages for the amount due thereon, and rendered judgment of foreclosure and sale accordingly. The case was taken to the Supreme Court of the State, which held (73 Minn. 332) that the prior mortgages were merged in the agreement, which created an equitable mortgage on the land, and remanded the case with instructions to the court below to determine the amount due upon such equitable mortgage and amend its findings of fact and conclusions of law accordingly. On the second trial, the Sawyers applied for leave to file a supplementary answer, setting forth their offer on the first trial to let judgment and decree be entered for the foreclosure of the equitable mortgage and the refusal of the plaintiff to accept such offer, and asserting that thereby the plaintiff had waived the lien of such equitable mortgage and precluded himself from foreclosing the same; and further, that a judgment in plaintiff's favor foreclosing said lien for any sum would deprive them of property without due process of law and deny to them the equal protection of the laws. The court declined to permit the filing of such supplementary answer, amended its findings of fact and conclusions of law, so as to show that the defendants had defaulted in the monthly payments referred to, and that therefore the equitable mortgage had become due, and entered a decree of foreclosure thereof and for the sale of the mortgaged premises. This decree was taken to the Supreme Court and affirmed, (78 Minn. 221,) and thereupon this writ of error was sued out.

Mr. Justice Brewer delivered the opinion of the Court.

In their application for leave to file a supplementary answer the plaintiffs in error averred that to render a decree foreclosing the equitable mortgage would, under the circumstances, be a taking of property without due process of law and denying to them the equal protection of the laws, and claimed "the protection guaranteed to all citizens of the United States by the provisions of section 10 of Article 1 of the Constitution of the United States and of section 1 of the Fourteenth Amendment to the Constitution of the United States." While they thus asserted the existence of a Federal question, yet it is well settled that the mere averment of such a question is not sufficient. As said in *Hamblin* v. *Western Land Company*, (147 U.S. 531, 532:)

"A real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of State courts. (*Millingar* v. *Hartupee*, 6 Wall. 258; *New Orleans* v. *New Orleans Waterworks Co.*, 142 U. S. 79, 87.) In the latter case it was said that 'the bare averment

of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay.'"

See also *Wilson* v. *North Carolina*, 169 U. S. 586; *St. Joseph & Grand Island Railroad Co.* v. *Steele*, 167 U. S. 659; *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336.

We think this case comes within that rule. Rulings in respect to the amendment of pleadings are largely within the discretion of the trial court, and unless a gross abuse of that discretion is shown there is no ground for reversal. (*Gormley* v. *Bunyan*, 138 U. S. 623.) Here the trial court refused to permit any amendment of the pleadings, for a supplementary answer is substantially such an amendment. We cannot see that the trial court abused its discretion, even if that were a Federal question and properly before us for consideration. All the facts in reference to the original mortgages and the agreement were set forth in full in the original complaint, and relief was asked in the alternative—either a strict foreclosure of the agreement, or, if that were deemed inequitable, a foreclosure of the original mortgages. The defendants in their answer set up all their defenses to plaintiff's claim of relief upon the facts stated in the complaint. That at the hearing they offered to consent to a decree of foreclosure of the equitable mortgage created by the agreement (which offer was declined by the plaintiff) did not pay the debt or release the property from the liens. Debts are not paid nor liens cancelled in that way. A defendant cannot by offering on a trial to consent to a judgment or decree for a part of the claim sued on, prevent the plaintiff from subsequently obtaining the judgment or decree demanded by the facts of the case, although it be that which had been offered and also declined. All the facts were before the trial court as well as the Supreme Court, and the decision was that which right and justice demanded. There is no merit in the defense which was sought to be interposed, and certainly nothing which calls upon this court to interfere with the decision of the State court.

The writ of error is

Dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.